Supreme Court, U.S.
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No. 07-880

IN THE

Supreme Court of the United States

PAUL LEONARD and JULIE LEONARD,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case is a candidate for summary disposition.

Nationwide Mutual Insurance Company ("Nationwide"), appellant below, sought review of the district court's interpretation of a clause of its insurance policy and of the district court's decision to permit the plaintiffs to pursue a contract modification claim based on oral representations of its agent. Nationwide prevailed on the latter issue at trial; the former issue was not, by Nationwide's admission, essential to the district court's judgment. "[T]he issues presented in the appeal do not implicate the $1,228.26 judgment in the Leonards' favor. . . ." Appellant's Response to Appellees' Motion to Dismiss Appeal and Cross-Appeal, 6.

The Fifth Circuit Court of Appeals agreed to hear and decide an appeal Nationwide brought not to challenge the district court's judgment, but solely to obtain a reformation/excision of the district court's non-essential dicta. The law is clear on this subject. An appellate court "reviews judgments, not opinions." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The Fifth Circuit's decision to permit the appeal to go forward for the sole purpose of considering the district court's reasoning, while leaving the judgment unchallenged, conflicts with decisions of this Court and of every Circuit of the Court of Appeals. Because the Fifth Circuit's decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power, this Court should grant a writ of certiorari, vacate the judgment of the

Fifth Circuit Court of Appeals, and remand with directions to dismiss the appeal.

Two questions are presented:

1. Whether an appellant has standing to obtain mere reformation of the reasoning of a district court even though appellant does not challenge the district court's judgment on appeal and concedes that the challenged dicta is not essential to the district court's judgment deciding the case between the parties.

2. Whether *Electrical Fittings Corp. v. Thomas & Betts Co.*[1] and *Deposit Guaranty Nat'l. Bank v. Roper*[2] were properly extended by the Fifth Circuit to allow an appellant who does not challenge a district court's judgment to maintain appellate standing to challenge a district court's dicta when the appellant asserts an injury that arises solely from the economic cost of defending itself in other cases involving other non-parties to the action *sub judice*.

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1. 307 U.S. 241 (1939).

2. 445 U.S. 326 (1980).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Leonard v. Nationwide Mutual Insurance Co.*, 499 F.3d 419 (5th Cir. 2007). The Fifth Circuit affirmed the August 15, 2006 decision of the United States District Court for the Southern District of Mississippi, which is reported at 438 F. Supp.2d 684 (S.D. Miss. 2006). See Appendixes A-D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fifth Circuit's opinion was rendered on August 30, 2007. The Petition for Rehearing En Banc was denied on October 2, 2007. Appendix E.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United State Constitution, Article III, Section 2, Clause 1.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to

Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Title 28 United States Code, Section 1291

Final Decision of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

Paul and Julie Leonard sued Nationwide for the denial of insurance coverage for property damage caused by Hurricane Katrina. The Leonards advanced two claims: First, the Leonards asserted that their insurance agent's oral representations created and reinforced the reasonable expectation of full coverage of damage in the event of a hurricane, regardless of the policy terms. Second, the Leonards averred that Nationwide breached its insurance contract by failing to pay fully for the damages they sustained as a result of the hurricane. Part of this second claim was an averment that the language of the anti-concurrent causation ("ACC") exclusion in the Nationwide insurance policy the Leonards purchased was ambiguous.

Following a bench trial the district court rejected the Leonards' negligent misrepresentation claim, entering a judgment in favor of Nationwide. The district court believed that the ACC clause was ambiguous, but held that the Leonards' damage resulted from independent[1], not concurrent causes. The district court entered judgment against Nationwide for $1,228.16, the amount of the wind-only damages that Nationwide agreed the Leonards' suffered. Because the district court did not find concurrent causation an issue, the district court's judgment did not depend on its conclusion that the ACC clause was ambiguous.

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1 The district court determined that wind (a covered loss) operating independently of water or storm surge (an excluded loss) caused some of the Leonards' damages.

Nationwide appealed, raising two issues:

> 1. Whether the district court erred by misinterpreting (a) the anti-concurrent causation clause and (b) weather conditions exclusion of Nationwide's standard homeowner's policy.
>
> 2. Whether the district court erred by permitting plaintiffs to litigate their insurance agent's alleged oral representations to both (a) plaintiffs themselves and (b) other Nationwide policyholders.

Brief of Appellant (Nationwide), p. 4.

Nationwide acknowledged that the issue set out in the first statement of the issues to the Fifth Circuit was not an essential part of the judgment. "In this case, the Court's construction of the anti-concurrent causation language did not affect plaintiffs' claim." Record on Appeal, p. 3110. Indeed, Nationwide did not ask for a reversal of any part of the judgment including the only thing that actually aggrieved it — the $1,228.16 that was awarded to the Leonards. "Nor has Nationwide challenged the district court's determination that there was additional wind damage to one of the Leonard's windows and their exterior walls." Brief of Appellant, p. 31. Rather, Nationwide sought a reformation of the district court's interpretation of the ACC that, according to Nationwide, "did not affect plaintiffs' claim." Record on Appeal, p. 3110. Throughout the appeal, Nationwide maintained that position, asserting that "the district court's erroneous legal rulings did not lead to the

$1,228.16 judgment in the Leonard's favor in this case." Appellant's Response to Appellees' Motion to Dismiss Appeal and Cross-Appeal, p. 2. Further, Nationwide admitted that it was not concerned at all with the judgment in the case between the parties to the instant litigation.

> While it is true that the issues presented in the appeal do not implicate the $1,228.16 judgment in the Leonard's favor, that point is immaterial. As Nationwide acknowledged in its opening brief, the injury at issue here is not the relatively modest judgment in the Leonard's favor, but instead the adverse collateral consequences of the district court's erroneous legal rulings in this case. *See*, NW Brief 32-34 n.5; 36-37 n.6.

Appellant's Response to Appellees' Motion to Dismiss Appeal and Cross-Appeal, p. 6.

Nationwide's appeal thus sought no more (and no less) than a reformation of the district court's conclusions of law, Nationwide's satisfaction with the judgment itself notwithstanding.

> This case stands at the front of a very long line of hundreds of Mississippi insurance cases arising out of Hurricane Katrina. . . . Accordingly, this is not some academic exercise in contract interpretation; Nationwide is "aggrieved by a district court decision that adversely affects its legal rights or position viv-a-vis other parties in the case or other potential litigants." [citations omitted].

Brief of Appellants, p. 33 n.5.

Nationwide's appeal of the issue it won outright – the negligent misrepresentation claim – likewise sought to address Nationwide's defenses in other litigation.

> Although the district court determined on the specific facts of this case that [the Leonards] failed to establish that agent Fletcher actually misled the Leonards, . . . Nationwide is nonetheless aggrieved by the court's refusal to treat the issue as legal rather than factual . . . As noted above, this case is the first in a long line of Hurricane Katrina cases pending in federal court in Mississippi. . . .

Id. at 36 n.6.

The Leonards filed a cross-appeal but moved to dismiss it prior to oral argument. Nationwide expressly assented to the dismissal and argued in favor of it, stating that the Clerk of the Fifth Circuit's duty to dismiss the Leonards' appeal was "ministerial and mandatory" under the Fifth Circuit's Local Rule 42.1, which governs unopposed dismissals of appeals. 5th Cir R. 42.1, Appellant's Response to Appellee's Motion to Dismiss Appeal and Cross-Appeal, p. 4 n.*. Nevertheless, the Fifth Circuit initially ignored its own rule and denied the Leonards' motion to dismiss their cross-appeal. Later, the Leonards asked the panel to reconsider its denial of their voluntary dismissal of the cross-appeal. Upon reconsideration, the Fifth Circuit permitted dismissal of the Leonards' cross-appeal. By that time,

however, the panel had already issued the opinion that is the subject of this Petition.[2]

Despite Nationwide's consistent concessions that the district court's construction of the ACC was irrelevant to its final judgment, Chief Judge Edith Jones, writing for the panel, stated that "[t]he validity of the ACC clause is the key interpretive battleground of this appeal." 499 F.3d at 425. The panel disagreed with the district court's ruling that the anti-concurrent causation clause is ambiguous; then it went further, making an *Erie* guess on the meaning and application of the ACC clause to hurricane cases generally and the authority of insurance agents to bind their principals on matters of contractual interpretation and coverage under Mississippi law.[3] On both issues, the panel adopted Nationwide's arguments *in toto*: it stated that no source of Mississippi law "restricts Nationwide's use of the ACC clause to preclude recovery for concurrently caused hurricane losses,"[4] and, on the claim for oral modification that Nationwide won at trial, the Fifth Circuit held that, "[t]he district court should never have considered the

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2. The panel's opinion was issued three days after the initial denial of the motion to dismiss the Leonards' cross-appeal.

3. There is Mississippi Supreme Court precedent contrary to the holding of the panel's reasoning in this case. *See Scott v. Transport Indemnity Co.*, 513 So. 2d 889, 894 (Miss.1987)("[t]he content and terms of the contract are not necessarily to be divined exclusively from the printed page.... Certain verbal representations made by persons with authority may become equally parts of the contract . . .")

4. 499 F.3d at 431.

argument because [the agent's] statements are irrelevant to interpreting this policy as a matter of Mississippi insurance law." 499 F.3d at 440. The panel thus acceded to Nationwide's wishes, both granting Nationwide standing to appeal district court dicta because of a claim of potential collateral consequence in other litigation and affirming the judgment of the district court while reforming the district court's non-essential reasoning.

REASONS FOR GRANTING THE PETITION

The decision below is an aberration in the law, permitting an appeal by a non-aggrieved party who is satisfied with the judgment but who fears that mere district court dicta may create collateral consequences in other litigation. The rule violated by the Fifth Circuit in this case is clear and followed faithfully by every circuit as well as this Court: federal appellate courts review judgments, not reasoning. The rule is an important prudential (and perhaps constitutional) limitation on the scope of judicial review of district court judgments.

Here, the Fifth Circuit relied on two cases of this Court, *Deposit Guaranty Nat'l. Bank v. Roper*, 445 U.S. 326 (1980) and *Electrical Fittings Corp. v. Thomas & Betts Co*, 307 U.S. 241 (1939), as a basis for allowing Nationwide standing to appeal the district court's dicta. Yet these two cases have not been expanded to allow what the Fifth Circuit permitted in this case. Indeed, several decisions of Circuits of the Court of Appeals and the learned commentators have concluded that the former decision must be limited to class action procedural appeals and the latter holding is itself an aberration.

Based on the settled law, the Fifth Circuit's opinion expands standing to appeal beyond direct Article III injury required by *Roper* to the mere (and legally unjustifiable) fear of collateral consequence in *other* cases. Courts, however, are restricted to deciding the case between the parties and that case alone. The next case, which comes with different parties, different factual nuance and different legal arguments, must be decided in its course, not by an appellate court hoping to avoid the necessary limitations that apply to and are inherent in a judicial system owing allegiance to the rule of law.

In the end, the notion that the Fifth Circuit used as the justification for broadening appellate standing beyond recognized prudential limits – Nationwide's fear of collateral consequences from district court dicta – simply cannot prevail as a matter of law. This is because the dicta of the district court was not essential to the district court's judgment and because neither district court judgments nor district court dicta have any precedential effect under our stare decisis regime.

Respectfully, the Fifth Circuit's decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a). This case is therefore an appropriate candidate for summary disposition. A grant of certiorari, followed by the vacation of the Fifth Circuit's opinion and a remand with instructions to dismiss the appeal will restore the prudential limits this Court and every other Circuit have recognized in determining appellate standing.

I. REVIEW IS WARRANTED TO RESTORE THE FIFTH CIRCUIT'S JURISPRUDENCE ON APPELLATE STANDING TO THE PRUDENTIAL LIMITS ADOPTED BY THIS COURT AND THE REST OF THE FEDERAL CIRCUIT COURTS OF APPEALS.

A. The Fifth Circuit's Decision To Exercise Jurisdiction Over Nationwide's Appeal To Seek A Reformation Of The Reasoning Of The District Court Without Seeking Reversal Of The Judgment Of The District Court Is An Aberrant Decision Contrary To The Holdings Of This Court And The Courts Of Appeals.

1. The Settled General Rule Denies Standing To An Appellant Who Merely Seeks Review Of The Reasoning Of A Judgment With Which The Appellant Otherwise Agrees.

The law is settled, and it has been for a long time. "The question before an appellate court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed." *M'Clung v. Silliman.*, 19 U.S. 598, 603 (1821) (emphasis in original).

"[T]he ultimate object to be obtained in a suit [is] a judgment." *Herb v. Pitcairn*, 324 U.S. 117, 123 (1945). Appellate courts review judgments, not the reasoning underlying judgments. Indeed, it is the judgment that determines whether a party is aggrieved, not the reasoning expressed along the road to judgment. Thus, a federal appellate court may generally consider a single

overarching issue when considering an appeal: whether "legal error resulted in an erroneous *judgment*. . . ." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (emphasis added).

This Court has stated consistently and repeatedly that it "reviews judgments, not opinions." *Id.* And this is so no matter how important the issue. See, *Mathias v. Worldcom Technologies, Inc.*, 535 U.S. 682, 684 (2002)("[a]s a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous"); *Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996)(Ginsburg, J., concurring in denial of certiorari)(explaining denial of petition for writ of certiorari raising question of national importance because petition challenged only rationale relied on by Court of Appeals); *California v. Rooney*, 483 U.S. 307, 311 (1987) (refusing to review pronouncement that search of trash was unconstitutional, where state, which sought to appeal, had won judgment that its search warrant nonetheless was valid); *Black v. Cutter Labs.*, 351 U.S. 292, 297 n.8 (1956) (Court would not pass on federal questions discussed in state court opinion that appeared to rest on adequate and independent state grounds); *Lindheimer v. Ill. Bell Tel. Co.*, 292 U.S. 151, 176 (1934)(holding successful party had no right to appeal to procure review of findings); *Corning v. Troy Iron & Nail Factory*, 56 U.S. 451, 467 (1853)("The law . . . does not give the party who is not aggrieved an appeal from a decree in his favor because the judge has given no reasons, or recited insufficient ones").

Still, there has been uncertainty in judicial pronouncements concerning the foundation of the rule prohibiting standing to appeal a lower court's reasoning when the judgment itself is not appealed. 28 U.S.C. § 1291 limits appellate jurisdiction to appeals from "final decisions." This Court's decision in *Deposit Guaranty Nat'l. Bank v. Roper*, 445 U.S. 326 (1980), announced that the rule "is one of federal appellate practice, however, derived from the statues granting appellate jurisdiction and the historic practices of appellate courts; it does not have its source in the jurisdictional limitations of Art. III." *Id.* at 333-34.

Despite *Roper*'s language, or perhaps because *Roper* also suggests that a party has standing to appeal "so long as that party retains a stake in the appeal satisfying the requirements of Art. III," 445 U.S. at 334, some appellate courts suggest that the rule is founded in Article III. *See, Asarco, Inc. v. Secretary of Labor*, 206 F.3d 720, 724 (6th Cir. 2000)(dismissing petition for review because appellant's claimed injury was too speculative to meet Article III injury in fact requirement); *In re O'Brien*, 184 F.3d 140, 142 (2nd Cir. 1999) (inability of a prevailing party to appeal a judgment because of passages in the opinion that displease him "is no minor point. Standing is not merely a prudential doctrine but an Article III limitation on the scope of federal judicial power"); *U.S. v. Accra Pac, Inc.*, 173 F.3d 630, 632 (7th Cir. 1999) (invoking Article III case or controversy requirement as basis for reluctance to review language of decree, without reviewing judgment); *Sea-Land Serv., Inc. v. Department of Transportation*, 137 F.3d 640, 647-48 (D.C. Cir. 1998)(characterizing prevailing parties' lack of standing to appeal as an "Article III barrier" based on their failure to show "a cognizable Article III injury").

For purposes of this Petition, it does not matter whether the rule finds its source in Article III, in statutes governing appeal, or in long-standing prudential limitations developed for appellate practice. The rule remains the same and is faithfully followed by most Circuits: Generally, a party may not appeal the district court's reasoning if it is otherwise satisfied with the judgment.

B. *Electrical Fittings Corp. v. Thomas & Betts Co.* And *Deposit Guaranty Nat'l. Bank v. Roper*, Create Exceptions To The General Rule, The Contours Of Which Are Not Well Understood Or Evenly Applied By Lower Courts.

Electrical Fittings Corp. v. Thomas & Betts Co, 307 U.S. 241 (1939) involved a patent-infringement defendant who obtained a judgment after the plaintiff failed to prove patent infringement. In its order, however, the district court also reached a decision that the patent at issue was a valid patent. Having prevailed on the claim that it had infringed the patent, the defendant sought to appeal that part of the decree finding the patent valid.

The Court first noted the accepted rule: "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." 307 U.S. at 242. Nevertheless, the Court permitted the prevailing defendant to appeal for the purpose of reforming the decree to excise the judicial conclusion regarding patent validity. The Court's decision failed to explain its holding, noting only that the court of appeals' dismissal of the appeal wrongly

concluded that the patent validity determination would not bind the appellant in subsequent suits. This Court held a contrary view because the validity determination "[stood] as an adjudication of one of the issues litigated." 307 U.S. at 242.

The commentators have struggled with the contours of federal appellate jurisdiction left by the summary opinion handed down in *Electrical Fittings*. Wright, Miller & Cooper suggest that the "decision is most easily understood as a ruling that it was improper to cast formal findings of patent validity as part of a decree in favor of the defendant." 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS 2D § 3902, at 86-87 (1992 & Supp. 2003). Wright, Miller & Cooper conclude that "[i]t is difficult to believe that prevailing party appeals should often be accepted on the theory that unnecessary findings may have adverse practical consequences. The principle of this decision has yet to be refined and controlled." *Id.*

Deposit Guaranty Nat'l. Bank v. Roper, 445 U.S. 326, 333 (1980), announced a second exception to the general rule. There, plaintiffs brought a proposed class action seeking money damages for their own behalf and for persons similarly situated. The district court denied class certification. When the Fifth Circuit denied interlocutory review, 28 U.S.C. § 1292(c), defendant bank tendered the maximum amount that each of the named plaintiffs could have recovered had they prevailed on the merits. Despite plaintiffs' objections to and rejection of the tender, the district court entered judgment in favor of plaintiffs (but not for the class) based upon defendant's tender.

Although they technically prevailed, the individual plaintiffs appealed the denial of class certification. The Court of Appeals found that the district court had erred in applying Rule 23, concluded that as a matter of *procedure*, the class should have been certified and reversed. On certiorari, this Court affirmed, noting that "[o]rdinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom," *Id.* at 333, but holding that the tender and entry of judgment for plaintiffs, over their rejection of the tender and objection to the judgment, neither mooted the case nor terminated the plaintiffs' right to appeal the denial of class certification. On the standing-to-appeal issue, the Court reasoned that even if the final judgment entered by the district court fully satisfied the plaintiffs' substantive claims, the denial of class certification dashed the plaintiffs' hopes of spreading the attorneys fees and costs of the litigation across the class, that such hopes were of sufficient economic import for the plaintiffs to retain an Article III stake in the litigation on appeal, and that the presence of the Article III stake created standing to appeal, even if the plaintiffs' individual claims would be fully satisfied by the tender. 445 U.S. at 332-36. The Court commented that "courts have a certain latitude in formulating the standards that govern the appealability of *procedural* rulings even though, as in this case, the holding may determine the absolute finality of a judgment, and thus, indirectly, determine whether the controversy has become moot." *Id.* at 340 (emphasis added).

Carefully read, the Court's opinion in *Roper* seems to limit its application to class actions. "We hold that the

Court of Appeals had jurisdiction to entertain the appeal only to review the asserted procedural error, not for the purpose of passing on the merits of the substantive controversy." 445 U.S. at 336.

The courts and commentators have concluded that *Roper* should not be read outside the class action context. Thus, *Roper* stands only for "a narrow exception that has been applied by the Supreme Court in unusual and limited circumstances." *ASARCO, Inc. v. Secretary of Labor*, 206 F.3d 720, 722 (6th Cir.2000). "In [*Roper*], the plaintiffs suffered actual economic injury from the district court's judgment denying class certification because the judgment precluded the individual plaintiffs from shifting part of the litigation costs to other class members." *Id.* at 724 (concurring opinion). "[T]he actual holding [of *Roper*] rests on the fact that, by not obtaining certification, plaintiffs would not be able to shift a portion of the costs of litigation to other members of the class[.]" *In re DES Litigation*, 7 F.3d 20, 25 n.5 (2nd Cir.1993).

Wright, Miller & Cooper likewise limit *Roper* to its class action setting, concluding that *Roper* is best considered in the context of "the practical reasons for making appeal available as a matter of class action doctrine. . . ." 15A Wright, Miller & Cooper, § 3902 at 89. Those commentators also predicted that application of *Roper* outside class certification questions would be problematic. "The additional emphasis on a personal stake in proper procedural rulings may cause some confusion in the future, and perhaps some awkward results as well. Untoward consequences need not occur, however, and it seems more likely than not that the opinion will be confined to its context." *Id.*

Whatever confusion it may have generated, *Roper* does not stand for the proposition that potential injury *in some other case* affords a personal stake sufficient to satisfy Article III standing. Yet that is exactly the use to which the Fifth Circuit put *Roper* in this case, when it said its opinion would "affirm the judgment of the district court, but to do so . . . work through some erroneous reasoning that led to its conclusion." *Leonard v. Nationwide Mut. Ins. Co*, 499 F.3d 419, 427 (5th Cir. 2007). As shown below, that is a statement of non-justiciability *per se*, the perfect preface to an advisory opinion.

C. The Fifth Circuit Improperly Extended *Electrical Fittings Corp.* And *Roper* Outside Their Contexts To Grant Standing To Appellants Who Sought Mere Reformation Of The District Court's Reasoning Without Challenging The Judgment.

Here, the Fifth Circuit loosed *Roper* from its class action/procedural moorings and, no longer fettered by ties to context, applied *Roper* to a circumstance in which the mere threat of "collateral injury [in some other case] inflicted by a lower court's ruling renders the injured party 'aggrieved' for purposes of Article III." *Leonard v. Nationwide Mut. Ins. Co*, 499 F.3d 419, 427 (5th Cir. 2007). Attempting to justify its departure from the settled rule, the Fifth Circuit wrote:

> Even the *Roper* dissenter recognized the fundamental principle that a party may appeal any aspect of a generally favorable judgment that affects him adversely, so long as the party

> can satisfy the personal-interest requirement of Article III. *See Roper;* 445 U.S. at 345-46 (Powell, J. dissenting) (Article III jurisdiction on appeal requires a "personal stake in the outcome *of the action*").

Id. (Emphasis added).

Even giving Justice Powell's dissent its broadest reading, it is clear that "the action" is not just any action, but the case *sub judice*; "the action" is manifestly *not* some other action. Yet the Fifth Circuit ignored this limitation, extending *Roper* to any other action (whether real or hypothetical) in which a party may be required to defend a superficially similar claim, factual and potentially outcome-determinative differences notwithstanding.

Other Circuits have considered *Roper* and found its reach far narrower. "In [*Roper*], the plaintiffs suffered actual economic injury from the district court's judgment denying class certification because the judgment precluded the individual plaintiffs from shifting part of the litigation costs to other class members." *ASARCO, Inc. v. Secretary of Labor*, 206 F.3d 720, 722 (6th Cir.2000)(concurring opinion). "[T]he actual holding [of *Roper*] rests on the fact that, by not obtaining certification, plaintiffs would not be able to shift a portion of the costs of litigation to other members of the class[.]" *In re DES Litigation*, 7 F.3d 20, 25 n.5 (2nd Cir.1993).

These cases' interpretations of *Roper* are narrower because they are more consonant with the long-observed precept that Article III's "case or controversy"

requirement means that an injury must be redressable in *this* case or controversy. Indeed, *Roper*'s conclusion that adverse collateral rulings are appealable "so long as that party retains a stake in the appeal satisfying the requirements of Article III," *Roper*, 445 U.S. at 334, is simply a reiteration of what has always been the rule: to appeal anything that happened in the lower court, a party must retain a stake that is still cognizable and reparable in *this* case, not some other. That condition is not present here. As the Second Circuit reasoned in distinguishing *Roper*. "In *this* case a reversal of the . . . rulings of the District Court would make no difference to any aspect of the financial consequences of *this* litigation." *In re DES Litigation*, 7 F.3d 20 at 25 n. 5)(emphasis added).

In addition to *Roper*, the Fifth Circuit relied on *Electrical Fittings* for the proposition that "collateral issues litigated below are appealable if they have the potential to affect rights of a party in future litigation" because, as the Fifth Circuit characterized *Electrical Fittings*, the "prevailing party in patent dispute [is] entitled to appeal [a] collateral ruling on the validity of a patent claim." 499 F.3d at 427 fn 1. But the Second Circuit saw the limits inherent in *Electrical Fittings*.

> *Electrical Fittings* is distinguishable in at least two ways. First, [the appellant here] does not ask us to vacate any portion of the *judgment*; what [the appellant here] seeks is a reversal of the interlocutory rulings. . . .
>
> Second . . . the District Court's rulings [here] . . . do not appear on the face of the

> judgment, as was the case with the finding of [patent] validity in *Electrical Fittings*. . . . We therefore are confronted [here] with an 'appellant' that seeks no modification of the judgment as entered. In these circumstances, appellate jurisdiction is improperly invoked.

In re DES Litigation, 7 F.3d at 25 (emphasis in original).

The Fifth Circuit panel also cited *Custer v. Sweeney*, 89 F.3d 1156, 1184 (4th Cir. 1196) to support is standing ruling without regard to the procedural limitations that molded *Custer*'s standing conclusion. As with *Roper* and *Electrical Fittings*, that reliance was ill-founded.

Custer involved two claims: first, that Sweeney, an attorney representing the Sheet Metal Union Pension Plan, was liable for participating in looting the plan because he was, as an attorney representing that plan, also a fiduciary under ERISA[5] and liable for breach of fiduciary duties; second, that Sweeney committed legal malpractice under Virginia common law. The district court found that the defendant was not a fiduciary under ERISA and dismissed that claim with prejudice; the district court also dismissed the common law claim without prejudice, thereby allowing a contemporaneously filed Virginia state court cause of action claiming common law legal malpractice to go forward. Although dismissed, Sweeney appealed. He claimed that the district court had jurisdiction over the entire case under federal law and should have dismissed the legal malpractice claim with prejudice because

5. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001*et seq.*

ERISA pre-empted the Virginia common law claim. The Fourth Circuit concluded that Sweeney had standing to appeal because of "the district court's refusal to exercise federal jurisdiction." *Id.* at 1164.

It is hardly surprising that *Custer* found standing on this procedural issue in view of the federal jurisdictional questions involved. The resolution of the jurisdictional question would determine whether a state court or a federal court would hear the common law issues already pending between the same parties in both fora. A party is obviously aggrieved by the failure of a federal court to exercise its mandatory jurisdiction in the manner provided by law. *See* 28 U.S.C. § 1332 ("The district courts *shall* have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.") (emphasis added).

What is surprising is how the Fifth Circuit turned *Custer* in this case. Rather than quoting accurately and completely from *Custer*, the panel selectively edited the passage on which it relied to support its standing conclusion.

> A party may be aggrieved by a district court decision that adversely affects its legal rights or position vis-a-vis other parties in the case or other potential litigants, [the Fifth Circuit's quotation ended here omitting *"but a desire for better precedent does not by itself confer standing to appeal]."* *HCA Health Services*, 957 F.2d [120] at 124 (4th Cir. 1992)].

Leonard, 499 F.3d at 428 (emphasis added to show omission).

From this wobbly platform, the Fifth Circuit concluded that Nationwide had standing to seek a reformation of the district court's discussion of the meaning of the ACC clause (which Nationwide admitted did not form the basis for the judgment) *and* the issues relating to the negligent representation claim (which Nationwide won at trial).

> Based on *Roper* and *Electrical Fittings*, Nationwide retains its aggrieved party status with respect to the rulings on the ACC clause and the negligent misrepresentation issues.
>
> * * *
>
> The ACC clause and the negligent representation issues are currently being litigated in hundreds of cases in the trial courts, causing Nationwide to incur considerable litigation expense and potential enormous liability to other policyholders. The *threat of additional claims* for bad-faith denial of coverage based on the court's rulings in this case also looms large for Nationwide. In sum, the district court's resolution of both the ACC clause and negligent misrepresentation issues renders Nationwide sufficiently aggrieved by the judgment below that it retains a stake in appealing the district court's damages methodology, as well as the collateral issue of the validity of Nationwide's homeowner's policy in the presence of allegedly contradictory oral representations by its agents.

Id. at 427-28 (emphasis added).

D. The Fifth Circuit's Attempt To Justify Its Departure From The Settled Rule Based On Potential Exposure To Offensive Collateral Estoppel Fails Because Collateral Estoppel Cannot Apply Under The Circumstances Presented In This Case.

Apparently aware of the heretical nature of its decision to permit Nationwide standing to appeal the judgment with which it did not disagree, the Fifth Circuit announced that this case

> is distinguishable from those in which parties appealed issues that had no effect on liability and that would not have preclusive effect in subsequent litigation. *See, e.g., ASARCO, Inc. v. Secretary of Labor*, 206 F.3d 720, 723-24 (6th Cir.2000) (finding that prevailing party was not aggrieved by administrative body's ruling because it posed no threat of preclusive effect in future litigation); *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640 (D.C.Cir.1998); *Bath Iron Works Corp. v. Coulombe*, 888 F.2d 179 (1st Cir.1989).

Leonard, 429 F.3d at 428 n.2. This was because, Chief Judge Jones mused,

> other potential litigants of course pose a Damoclean threat to the party aggrieved by collateral rulings because of the potential for the offensive use of nonmutual collateral estoppel in future litigation. *See AT&T Corp. v. FCC*, 317 F.3d 227, 237-38 (D.C.Cir.2003)

> (finding standing on the basis of collateral estoppel and holding that AT&T had an Article III stake sufficient to support appeal of a ruling that it was liable for termination of certain access charges but not required to make payments); *WorldCom, Inc. v. FCC*, 246 F.3d 690, 695-96 (D.C.Cir.2001) (commenting that although petitioner favored the ultimate result reached by FCC, it may have standing to challenge an unfavorable ruling because of the effect on its future legal rights).

Id.

The Fifth Circuit's additional justifications concerning collateral estoppel stray so far from the long observed rules of federal judicial practice that, taken with its expansive view of Article III standing, the entire discussion of federal jurisdiction in this case constitutes the kind of radical departure from the usual course of judicial proceedings that warrants a grant of certiorari.

First, the cases on which the Fifth Circuit relied are regulatory cases in which appellate standing is broader because of the implications of administrative decisions on similarly situated regulated entities. Second, the rules governing collateral estoppel forbid application of that doctrine under the circumstances presented by this case.

AT&T and *WorldCom*, upon which the Fifth Circuit relied, are regulatory cases involving agency rulings. By most accounts, "[s]tanding to challenge agency adjudications is of course more expansive than standing to appeal lower court judgments . . ." *Radiofone, Inc. v.*

F.C.C., 759 F.2d 936, 939 (D.C.Cir.1985)(Scalia, J.) This is because "not only the losing party before the agency but even competitors of the winning party, or other persons with interests adverse to the winning party, may often sue." *Id.* Even then, however, the "injury must still arise from the particular activity which the agency adjudication has approved . . . and not from the mere precedential effect of the agency's rationale in later adjudications. *Id.*

In *AT&T*, the D.C. Circuit permitted the appeal to advance because the actual injury test of injury set out by then-Judge Scalia in *Radiofone* was met; the FCC "determined that AT&T was liable to Total for reasonable access charges and the district court will be bound to follow the *Order*, giving it a preclusive effect more akin to law of the case than to mere collateral estoppel." *AT&T*, 317 F.3d at 238 (emphasis in original). Thus, because AT&T challenged the FCC's finding of its liability *in that case* (and not some other case), the FCC's Order, "injures AT&T and gives it a stake in this appeal sufficient to support its standing to petition for review of the Commission's ruling on its liability for access charges." This is the sort of injury required for appellate standing under *Radiofone* (and arguably *Roper* given its broadest reading).

The Fifth Circuit's reliance on *WorldCom* fares no better when *WorldCom* is carefully examined. There, WorldCom petitioned for appellate review of an FCC Order even though it agreed with the FCC's broad ruling. WorldCom claimed appellate standing because it disagreed with a portion of the FCC's rationale that prohibited WorldCom from receiving reciprocal

compensation. The D.C. Circuit discussed but did not reach the issue of WorldCom's standing. The Court explained that because a co-petitioner, Qwest, "has undoubted standing to attack the Commission's second theory, we need not pursue the suggestion" that WorldCom might have independent standing. *WorldCom*, 246 F.3d at 696. "The standing of one petitioner is enough." *Id.*

Even shorn of its misplaced reliance on regulatory precedent, the Fifth Circuit's offensive collateral estoppel argument in this case finds no support in the law relating to collateral estoppel either. Indeed, the Fifth Circuit has shown that it knows the doctrine better that that. *See Sierra Club v. Babbitt*, 995 F.2d 571, 575 (5th Cir. 1993) (holding certain findings not to have preclusive effect because irrelevant to relief ordered, and concluding that appellants lacked standing to challenge them).

As *AT&T* notes, "neither the Supreme Court nor this court has actually found [appellate] standing on the basis of collateral estoppel." 317 F.3d at 238 (citation omitted). This is because application of collateral estoppel requires that the holding upon which issue preclusion is sought in a subsequent action with a nonparty must reside at the core of the first court's determination. "[O]nce a court has decided an issue of fact or law *necessary to its judgment*, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 646 U.S. 323, 336 fn 16 (2005)(emphasis added); see also RESTATEMENT (SECOND) OF JUDGMENTS § 17(3) (1982) ("judgment in

favor of either the plaintiff or the defendant is conclusive . . . if its determination was essential to the judgment").

By Nationwide's own admission in this case, "it is true that the issues presented in [Nationwide's] appeal do not implicate the $1,228.16 judgment in the Leonard's favor. . . ." Appellant's Response to Appellee's Motion to Dismiss Appeal and Cross Appeal, p. 6. This statement is, of course, nothing more than a recognition by Nationwide that a determination along the judicial path that is adverse to a prevailing party cannot be essential – or even necessary – to the final judgment in his favor.

Moreover, the dicta from which Nationwide seeks relief is dicta of a district court. By no one's light does the dicta of a district court create binding precedent. In *Radiofone*, then-Judge Scalia distinguished standing to appeal a final determination of a regulatory rule "addressed to the world at large" from the general rule of appellate standing.

> The situation is different, however, when an interpretation of a statute, or some other legal principle, is set forth *as the rationale of an adjudication.* No one would contend that a person affected by no more than the precedential effect of a district court decision would have standing to appeal that decision here.

Radiofone, 759 F.2d at 938 (Scalia, J.)(emphasis in original). *See, also, e.g., Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995)("District court decisions have no weight as precedents, no authority") and *Fox v. Acadia*

State Bank, 937 F.2d 1566, 1570 (11th Cir. 1991)(a "district court is not bound by another district court's decision, or even an opinion by another judge of the same district court").

The collateral estoppel rationale the Fifth Circuit adopted to allow appellate standing is inherently circular, and therefore flawed. Because the district court's dicta is both without precedential effect (because it is *district court* dicta) and not essential to the judgment (because it is *dicta*), the only way the dicta can achieve the collateral consequence the Fifth Circuit fears is by the Fifth Circuit granting standing to appeal and deciding the case.

The leading commentator observed the flaw in the collateral estoppel basis for appellate standing where a judgment is not attacked and concluded that "it is better to deny appeal and forbid preclusion than to permit appeal in order to support preclusion," 15A Wright, Miller & Cooper, § 3902, at 83. Indeed, "[t]he present system that denies appeal and with it denies preclusion is much better than the alternative of offering the opportunity to appeal and enforcing preclusion accordingly." 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2D § 4421, at 559-61 (2002 & Supp. 2003). The DC Circuit agrees.

> The argument for standing would necessarily have a bootstrap quality: it would infer standing [to appeal] in an initial case from the possibility of collateral estoppel in a later one - a possibility that . . . could . . . materialize

> [only] if standing were found in the first case. To create standing out of the preclusive effect that would flow from granting standing is to create it ex nihilo. In contrast, our denial of standing here necessarily implies that petitioners may not be estopped from challenging these findings in a later court case.

Ala. Mun. Distribs. Group v. FERC, 312 F.3d 470, 474 (D.C. Cir. 2002); *see also Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1076 (9th Cir. 2001) ("As collateral estoppel does not apply to an unappealable determination, simply holding a ruling unappealable eliminates any prospect of preclusion")(quoting *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998)); *Concerned Citizens of Cohocton Valley, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 127 F.3d 201, 205-06 (2d Cir. 1997) (noting, but not deciding the circularity problem: "a prevailing party should not be entitled to appeal to avoid the preclusive effect of a subsidiary ruling, since the fear of preclusion is unfounded").

Ironically (if not intentionally), the Fifth Circuit has managed to turn an unfounded fear of potential collateral injury to Nationwide in other litigation into a sword that Nationwide can wield offensively against other Katrina litigants – all by the simple act of deciding this appeal despite Nationwide's lack of standing. This is, of course, exactly what Nationwide hoped for when it appealed "erroneous legal rulings [that] did not lead to the judgment. . . ."

E. The Cost Of Future Litigation Does Not Give Nationwide Standing.

The Fifth Circuit also concluded that a party retains a sufficient stake in the appeal if the district court's collateral rulings would "caus[e] Nationwide to incur considerable litigation expense and potential enormous liability to other policyholders." *Leonard*, 499 F.3d at 428. The Fifth Circuit thus accepted Nationwide's argument that it retained a personal stake in the appeal because the district court's collateral rulings would "caus[e] Nationwide to incur considerable litigation expense and potential enormous liability to other policyholders" in other cases. *Leonard*, 499 F.3d at 428, relying on *Roper*.

Other courts have not read *Roper* so broadly:

> [*Roper*] recognized that a winning party will be considered aggrieved by a favorable judgment if future economic loss will result to the party on account of adverse collateral rulings. . . . [F]uture economic loss does not include the costs of re-litigating the same issue at a later date.

Environmental Protection Informational Center, Inc. v. Pacific Lumber Company, 257 F.3d 1071, 1076 (9th Cir. 2001) (citations omitted).

Nationwide's future litigation is just that – future litigation. It will be required to defend against different parties and presently-unknowable facts in those cases. That other litigation does not give the Fifth Circuit a principled basis for providing a prophylactic ruling on dicta that was not essential to the district court's judgment.

F. The Circuits Are Nearly Unanimous In Their Disagreement With The Fifth Circuit's Standing Decision In This Case.

In a non-regulatory, non-class action setting, the Courts of Appeals adhere to the settled rule that appellate standing does not exist for a party seeking review of district court dicta when the judgment goes unchallenged.

One need not look beyond the Fifth Circuit itself to find a conflict. *Ward v. Santa Fe Ind. School Dist.*, 393 F.3d 599, 603 (5th Cir. 2004), held that "[f]ederal appellate courts review judgments, not opinions." Other Circuits adhere to a similar rule. For example:

First Circuit: *In re Williams*, 156 F.3d 86, 90-92 (1st Cir. 1998) (findings of fact attributing misconduct to government attorney not appealable sanctions following nullification of monetary sanctions, where not expressly identified as reprimand);

Second Circuit: *In re O'Brien*, 184 F.3d 140, 142 (2nd Cir. 1999) (disagreement with reasons for judgment in party's favor is insufficient to confer standing to appeal); *Concerned Citizens of Cohocton Valley, Inc. v. New York State Dep't. of Environmental Conservation*, 127 F.3d 201, 204 (2nd Cir. 1997);

Third Circuit: *Watson v. City of Newark*, 746 F.2d 1008, 1010-11 (3rd Cir. 1984)(appellant must be aggrieved by the order appealed from);

Fourth Circuit: *HCA Health Cervices of Virginia v. Metropolitan Life Ins. Co.*, 957 F.2d 120, 123 (4th Cir. 1992)(Generally, a prevailing party is not aggrieved by the judgment and may not appeal on the ground that the trial court based its decision on a reason other than one the party may have wished);

Sixth Circuit: *Asarco, Inc. v. Sec'y of Labor*, 206 F.3d 720, 723-24 (6th Cir. 2000) (prevailing party without standing to appeal due to highly speculative nature of injury allegedly arising from dicta);

Seventh Circuit: *United States v. Accra Pac, Inc.*, 173 F.3d 630, 632 (7th Cir. 1999) ("appellate courts do not issue Writs of Erasure to change language in district judges' opinions, when the judgments are uncontested"); *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir.2000)([a] winning party cannot appeal merely because the court that gave him his victory did not say things that he would have liked to hear").

Eighth Circuit: *Mach v. Abbott Co.*, 136 F.2d 7 (8th Cir. 1943) ("The rule is well settled that one who secures by a judgment, order or decree all the relief he seeks cannot maintain an appeal to reverse or modify it or to review the proceedings on which it is founded");

Ninth Circuit: *Environmental Protection Informational Center, Inc. v. Pacific Lumber Co.*, 257 F.3d 1071, 1076 (9th Cir. 2001) (Future economic costs does not include costs of re-litigating the same issue);

Tenth Circuit: *Keyes v. Sch. Dist. No. 1*, 119 F.3d 1437, 1446 n.14 (10th Cir. 1997) (statements about constitutionality of state law in district court's opinion

were not essential to any issue properly before court, presented no threat under doctrines of claim or issue preclusion, and hence were not appealable);

Eleventh Circuit: *Knight v. State of Alabama*, 14 F.3d 1534, 1555-56 (11th Cir. 1994)(Only a litigant "who is aggrieved by the judgment or order may appeal");

Federal Circuit: *Penda Corp. v. United States*, 44 F.3d 967, 970-73 (Fed. Cir. 1994)(refusing to permit third-party defendant, Cadillac, which was not adverse party to U.S. in the proceedings, to appeal judgment against United States in patent infringement action because judgment could not preclude Cadillac from relitigating validity of patent; Cadillac was only nominal defendant before Court of Federal Claims because of limits on its subject-matter jurisdiction, and because court would not permit appeal);

D.C. Circuit: *Radiofone*, 759 F.2d at 940 ("it is not the dispute between the appellant and the district court that we adjudicate and that forms the basis of our Article III jurisdiction but rather the same dispute between the parties to the case that formed the basis for the jurisdiction of the district court. As soon as that dispute terminates, therefore – whatever may be the precedential effect of the district court decision – our jurisdiction terminates as well").

The overwhelming weight of authority is contrary to the Fifth Circuit's decision granting Nationwide standing in this case. The prospect of many cases raising similar issues in federal courts cannot justify a departure from settled rules governing appellate standing.

See, Mignes v. Fibreboard Corp., 662 F.2d 1182, 1189 (5th Cir. 1981) (existence of over three thousand asbestos cases in Eastern District of Texas does not justify expansion of settled rules of stare decisis).

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 30, 2007

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-61130

PAUL LEONARD; JULIE LEONARD,

Plaintiffs-Appellees-Cross-Appellants,

v.

NATIONWIDE MUTUAL INSURANCE CO.,

Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Mississippi

Before JONES, Chief Judge, and REAVLEY and SMITH, Circuit Judges.

EDITH H. JONES, Chief Judge:

This homeowner's policy coverage dispute arose from the destruction wrought by Hurricane Katrina along the Mississippi Gulf Coast. We affirm the judgment of the district court, but to do so we must work through some erroneous reasoning that led to its conclusion.

Appendix A

I. Background

The Leonards' home lies twelve feet above sea level on the southmost edge of Pascagoula, Mississippi, less than two hundred yards from the Mississippi Sound. Hurricane Katrina battered Pascagoula with torrential rain and sustained winds in excess of one hundred miles per hour. By midday, the storm had driven ashore a formidable tidal wave-also called a sto n or tidal surge-that flooded the ground floor of the Leonards' two-story home.

A. The Policy

The Leonards purchased their first Nationwide homeowner's policy from Nationwide's Pascagoula-area agent, Jay Fletcher, in 1989. Although Nationwide twice revised its standard homeowner's policy language between 1989 and 2005, the Leonards' "Form HO-23-A" policy that was in force when the storm made landfall was substantially indistinguishable from the "Elite II" policy they originally purchased.

Like almost all homeowner's policies, Nationwide's Form HO-23-A is a "comprehensive," or "all-risk," policy pursuant to which all damage to dwellings and personal property not otherwise excluded is covered. Also, like almost all homeowner's policies, Nationwide's policy covers only damage caused by certain instrumentalities-or "perils"-and excludes damage caused by others. Relevant to this appeal are the policy provisions that

Appendix A

define the scope of coverage for damage caused by (1) wind; (2) water; and (3) concurrent action of wind and water.

1. Wind

Wind damage both to a dwelling and to personal property is a peril insured against under Section I, clause 2 (the "wind-damages clause"), which along with pertinent prefatory language states:

> Coverage A – Dwelling and
>
> Coverage B – Other Structures
>
> (. . .)
>
> Coverage C – Personal Property
>
> We cover accidental direct physical loss to property described in Coverage C caused by the following perils except for losses excluded under Section I – Property Exclusions:
>
> (. . .)
>
> 2. windstorm or hail.
>
> Direct loss caused by rain . . . driven through roof or wall openings made by direct action of wind, hail, or other insured peril is covered . . . .

Appendix A

The policy thus covers losses caused by rain blown through a hole in a roof, wall, or window. Exclusively wind-related damage, like a blown-off roof, or a window damaged by a wind-propelled projectile, is also covered.

2. Water

Like most homeowner's policies, the Leonards' policy unambiguously excludes damage caused by water-including flooding-in a broadly worded exemption clause (the "water-damages exclusion"):

> Property Exclusions
>
> (Section I)
>
> (. . .)
>
> (b) Water or damage caused by water-borne material. Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly, to cause the loss. Water and water-borne material damage means:
>
> 1. flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind
> . . . .

Appendix A

When the Leonards annually renewed their policy, they received the following notice from Nationwide informing them that flood losses would not be covered, but that additional flood coverage was available upon request:

> IMPORTANT INFORMATION
>
> A Message From Your Nationwide Agent:
>
> Your policy does not cover flood loss. You can get protection through the National Flood Insurance Program. If you wish to find out more about this protection, please contact your Nationwide Agent.

The Leonards never purchased additional flood coverage under the federally subsidized National Flood Insurance Program ("NFIP"). *See* 42 U.S.C. §§ 4001-4027.

3. Concurrent Action by Wind and Water

The prefatory language introducing the water-damages exclusion addresses situations in which damage arises from the synergistic action of a covered peril, e.g., wind, and an excluded peril, e.g., water:

> 1. We do not cover loss to any property resulting directly or indirectly from any of the following. *Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss* . . . .

Commonly referred to as an "anticoncurrent-causation clause," or "ACC clause," this prefatory language denies coverage whenever an excluded peril and a covered peril combine to damage a dwelling or personal property. The inundation of the Leonards' home was caused by a concurrently caused peril, i.e., a tidal wave, or storm surge – essentially a massive wall of water – pushed ashore by Hurricane Katrina's winds. Accordingly, argues Nationwide, losses attributable to storm surge-induced flooding are excluded under the ACC clause. The validity of the ACC clause is the key interpretive battleground of this appeal.

B. Paul Leonard's Conversations with Fletcher

Paul Leonard testified that when he first bought his policy in 1989, he asked Nationwide's agent Jay Fletcher whether the Nationwide policy covered hurricane-related losses. According to Leonard, Fletcher responded that all hurricane damage was covered. Fletcher stated in his deposition testimony that he did not recall this conversation; the district court deemed it irrelevant to the case.

Leonard claims he spoke again with Fletcher ten years later to discuss a proposed increase in the wind/hail deductible that Nationwide was instituting on its homeowner's policies. Leonard called Fletcher after seeing advertisements for additional NFIP coverage in the wake of Hurricane Georges, which struck the Mississippi coast in 1998. Fletcher allegedly assured Leonard that he did not need additional flood coverage

because Leonard did not live in an area classified Zone A for flood risk by the Federal Emergency Management Agency ("FEMA"). Fletcher purportedly added that his own property was not insured under the NFIP. Leonard does not allege that Fletcher told him the Nationwide policy covered flooding caused by a hurricane; Leonard merely inferred from Fletcher's comments that such coverage existed.

At the bench trial, the district court admitted under Federal Rule of Evidence 406 what it characterized as evidence that Fletcher "as a matter of habit and routine, expressed his opinion . . . that customers [in Pascagoula] should not purchase flood insurance unless they lived in a flood prone area (Flood Zone A) where flood insurance was required in connection with mortgage loans." *Leonard v. Nationwide Mut. Ins. Co.*, 438 F.Supp.2d 684, 690 (S.D.Miss.2006). Trial evidence demonstrated that between 2001 and Katrina's landfall in late August 2005, Fletcher sold approximately one hundred eighty-seven NFIP policies to Pascagoula-area customers, twelve of whom lived in the Leonards' waterfront neighborhood.

C. Hurricane Damage

Inspection of the Leonards' residence following the storm revealed modest wind damage. The roof suffered broken shingles and loss of ceramic granules, but its water-tight integrity was not compromised. The non-load-bearing walls of the garage and the garage door were severely damaged; doors in the house and garage had been blown open. Finally, a "golf-ball sized" hole in

a ground-floor window was likely caused by a wind-driven projectile.

Water damage, in contrast, was extensive. The Leonards' neighborhood had suffered a seventeen-foot storm surge, causing the entire ground floor of their residence to become inundated under five feet of water blown ashore from the Mississippi Sound. Walls, floors, fixtures, and personal property sustained extensive damage. The second floor of the house remained unscathed.

Nationwide's adjuster evaluated the storm damage and, after applying the Leonards' five hundred dollar deductible, tendered a check for $1,661.17 – the amount determined attributable solely to wind. Nationwide informed the Leonards that damages caused by water and the storm surge's concurrent wind-water action were barred, respectively, by the water-damages exclusion and the ACC clause.

At trial, the Leonards offered expert testimony that the total damages actually exceeded $130,000, but this figure did not apportion damages caused by different perils. The Leonards' wind-specific assessment claimed $47,365.41, including costs for roof replacement and structural repairs to the garage.

D. Procedural History

Before trial, Nationwide moved for partial summary judgment, arguing that: (1) the ACC clause and water-

damages exclusion unambiguously precluded coverage for any damage not solely attributable to wind, and (2) Fletcher's purported oral statements to Paul Leonard could not modify the policy's scope of coverage under Mississippi agency law. Additionally, Nationwide moved *in limine* to exclude evidence of any statements made by Fletcher to Nationwide policyholders other than the Leonards under Federal Evidence Rule 406. The district court carried Nationwide's motions with the case.

Following a bench trial, the district court entered judgment for the Leonards in the amount of $1,228.16-damage determined to have been caused solely by wind. The court held that the water-damages exclusion was enforceable and precluded coverage for any damages occasioned by water. *See Leonard,* 438 F.Supp.2d at 693, 696. Significantly, however, the court struck down the ACC clause as ambiguous and unenforceable: "Under applicable Mississippi law, in a situation such as this, where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss), the insured may recover that portion of the loss which he can prove to have been caused by wind." *Id.* at 695 (citation omitted). The district court maintained that wind damage was recoverable " *even if [it] occurred concurrently or in sequence with the excluded water damage.*" *Id.* at 693 (emphasis added).

The court denied Nationwide's partial summary judgment motion regarding Fletcher's oral statements, but nonetheless held that Fletcher did not materially misrepresent the policy terms, nor did he "make any

statements which could be reasonably understood to alter" the policy terms. *Id.* at 691-92.

Nationwide appeals. The Leonards cross-appealed, but they subsequently withdrew their cross-appeal.

II. Discussion

A. Appellate Jurisdiction

Shortly before this court was scheduled to hear oral argument, the Leonards moved to dismiss their cross-appeal and contended that, as a result, Nationwide's appeal must be dismissed for mootness and lack of standing. They are incorrect. Nationwide's appeal alone continues to present a live Article III controversy over which we are obliged to exercise appellate jurisdiction. *See* 28 U.S.C. § 1291.

The Leonards' major premise is that the money judgment below represents the entirety of the ruling inflicted on Nationwide by the district court's decision. Because Nationwide does not challenge the amount awarded, Nationwide "suffered no injury or prejudice at trial," and this appeal no longer presents a case or controversy. Their minor premise is that the district court's dual findings that (1) the ACC clause is ambiguous and (2) an agent's negligent misrepresentations can be used to challenge the enforceability of the Nationwide policy are unappealable "dicta" which do not vest Nationwide with a cognizable Article III injury.

"Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333, 100 S.Ct. 1166, 1171, 63 L.Ed.2d 427 (1980). Although *Roper*'s discussion of an aggrieved party's right to appeal occurred in the class-action context, its core holding in regard to standing obtains here: If redressable on appeal, collateral injury inflicted by a lower court's ruling renders the injured party "aggrieved" for purposes of Article III. Even the *Roper* dissenters recognized the fundamental principle that a party may appeal any aspect of a generally favorable judgment that affects him adversely, so long as the party can satisfy the personal-interest requirement of Article III. *See Roper*, 445 U.S. at 345-46, 100 S.Ct. at 1178 (Powell, J., dissenting) (Article III jurisdiction on appeal requires a "personal stake in the outcome of an action").[1]

Based on *Roper* and *Electrical Fittings*, Nationwide retains its aggrieved party status with respect to the rulings on the ACC clause and the negligent

1. The Court reached the same conclusion outside the class-action context in *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 59 S.Ct. 860, 83 L.Ed. 1263 (1939), when it held that collateral issues litigated below are appealable if they have the potential to affect rights of a party in future litigation. *See id.* at 242, 59 S.Ct. at 860-61 (prevailing party in patent dispute entitled to appeal collateral ruling on the validity of a patent claim). The Supreme Court reversed the Court of Appeals' decision that the threat of collateral estoppel in subsequent suits did not render the appellant a sufficiently "aggrieved party" within the meaning of Article III. *See id.*; *Roper*, 445 U.S. at 334, 100 S.Ct. at 1172.

misrepresentation issues. The district court left Nationwide with a ruling that: (1) invalidates a key provision of its homeowner's policy as a matter of Mississippi law; (2) superimposes an entirely different causal matrix for the determination of covered damages than the policy contemplated; and (3) allows the introduction of extrinsic oral statements to "clarify" the meaning of Nationwide's policy terms and potentially to affect the coverage available. It stretches credulity to suggest that these rulings, which were integral to the district court's decisionmaking process, do not adversely affect Nationwide's rights or render it an aggrieved party in this appeal.

The district court found the ACC clause ambiguous, leading it to conclude: "Thus, [the ACC] language does not exclude coverage for different damage, the damage caused by wind, a covered peril, even if the wind damage occurred concurrently or in sequence with the excluded water damage. The wind damage is covered; the water damage is not." *See Leonard*, 438 F.Supp.2d at 693. The court applied "established Mississippi law" dating from the Hurricane Camille cases and explicitly held that a Mississippi policyholder could parse out and recover for loss due to covered wind damage that combined with excluded water damage in a concurrently caused peril. Consequently, as a matter of Mississippi law, Nationwide's ACC clause is invalid. That such rulings vitally affect Nationwide's rights in subsequent litigation involving its homeowner's policy would seem to be emphasized by the Leonards' determination to render the rulings unassailable on appeal.

Appendix A

The district court's resolution of factual concurrent causation, as of the negligent misrepresentation issue, did not affect the damages Nationwide must pay *in this case,* but that is immaterial for purposes of the Article III standing inquiry we undertake here. "A party may be aggrieved by a district court decision that adversely affects its legal rights or position vis-à-vis other parties in the case or other potential litigants." *Custer v. Sweeney,* 89 F.3d 1156, 1164 (4th Cir.1996).[2] The ACC clause and negligent misrepresentation issues are currently being litigated by Nationwide in hundreds of cases in the trial courts, causing Nationwide to incur

2. And although not discussed by the Fourth Circuit in *Custer,* "other potential litigants" of course pose a Damoclean threat to the party aggrieved by collateral rulings because of the potential for the offensive use of nonmutual collateral estoppel in future litigation. *See AT&T Corp. v. FCC,* 317 F.3d 227, 237-38 (D.C.Cir.2003) (finding standing on the basis of collateral estoppel and holding that AT&T had an Article III stake sufficient to support appeal of a ruling that it was liable for termination of certain access charges but not required to make payments); *WorldCom, Inc. v. FCC,* 246 F.3d 690, 695-96 (D.C.Cir.2001) (commenting that although petitioner favored the ultimate result reached by FCC, it may have standing to challenge an unfavorable ruling because of the effect on its future legal rights). The instant case is distinguishable from those in which parties appealed issues that had no effect on liability and that would not have preclusive effect in subsequent litigation. *See, e.g., ASARCO, Inc. v. Secretary of Labor,* 206 F.3d 720, 723-24 (6th Cir.2000) (finding that prevailing party was not aggrieved by administrative body's ruling because it posed no threat of preclusive effect in future litigation); *Sea-Land Serv., Inc. v. Dep't of Transp.,* 137 F.3d 640 (D.C.Cir.1998); *Bath Iron Works Corp. v. Coulombe,* 888 F.2d 179 (1st Cir.1989).

considerable litigation expense and potential enormous liability to other policyholders. The threat of additional claims for bad-faith denial of coverage based on the court's rulings in this case also looms large for Nationwide. In sum, the district court's resolution of both the ACC clause and negligent misrepresentation issues renders Nationwide sufficiently aggrieved by the judgment below that it retains a stake in appealing the district court's damages methodology, as well as the collateral issue of the validity of Nationwide's homeowner's policy in the presence of allegedly contradictory oral representations by its agents.

B. Standard of Review

The interpretation of an insurance policy, like any contract, is a legal question reviewed *de novo, Welborn v. State Farm Mut. Auto. Ins. Co.*, 480 F.3d 685, 687 (5th Cir.2007) (per curiam), as is its denial of Nationwide's partial summary judgment motion on the negligent misrepresentation*429 claim. *Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 879 (5th Cir.2004). Factual findings are upheld on appeal unless clearly erroneous. *Provident Life & Accident Ins. Co. v. Sharpless*, 364 F.3d 634, 641 (5th Cir.2004). Evidentiary rulings are reviewed for abuse of discretion. *Hodges v. Mack Trucks Inc.*, 474 F.3d 188, 194 (5th Cir.2006).

C. General Principles of Mississippi Insurance Law

"The initial question of whether the contract is ambiguous is a matter of law." *Benchmark Health Care*

Ctr., Inc. v. Cain, 912 So.2d 175, 182 (Miss.2005) (citation omitted). Mississippi courts give effect to the plain meaning of an insurance policy's clear and unambiguous language. *Robley v. Blue Cross/Blue Shield of Miss.*, 935 So.2d 990, 996 (Miss.2006). "No rule of construction requires or permits [Mississippi courts] to make a contract differing from that made by the parties themselves, or to enlarge an insurance company's obligations where the provisions of its policy are clear." *State Auto. Mut. Ins. Co. of Columbus v. Glover*, 253 Miss. 477, 176 So.2d 256, 258 (1965). Nor will a court resort to extrinsic evidence or rules of contract construction if policy provisions are unambiguous. *Jackson v. Daley*, 739 So.2d 1031, 1041 (Miss.1999).

If a court determines that ambiguity inheres in the policy language, the familiar maxim *omnia praesumuntur contra proferentem* requires the court to construe ambiguous terms in favor of the policyholder. *J&W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So.2d 550, 552 (Miss.1998). Ambiguity arises when a term or provision is susceptible to more than one reasonable meaning, but can also result from "internal conflict" between policy provisions that renders uncertain the meaning of the policy as a whole. *See Miss. Farm Bureau Mut. Ins. Co. v. Walters*, 908 So.2d 765, 769 (Miss.2005). The court must then select the interpretation "which gives the greater indemnity to the insured." *State Farm Mut. Auto. Ins. Co. v. Scitzs*, 394 So.2d 1371, 1372 (Miss.1981). Nonetheless, "[t]he mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract

ambiguous as a matter of law." *Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So.2d 400, 404 (Miss.1997) (citing *Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416, 419 (Miss.1987)).[3]

The burden of proving that coverage exists for a peril under an insurance policy rests with the policyholder. *Lunday v. Lititz Mut. Ins. Co.*, 276 So.2d 696, 698 (Miss.1973). The insurer bears the burden of proving that a particular peril falls within a policy exclusion; the insurer must plead and prove the applicability of an exclusion as an affirmative defense. *Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777, 782 (Miss.1971). Mississippi courts strictly construe policy exclusions against the insurer. *Scitzs*, 394 So.2d at 1372-73.

D. The Anti-Concurrent Causation Clause

Although the district court granted the Leonards only a meager monetary recovery for losses proven to have been caused by wind, it also summarily invalidated the ACC clause, stating that "[t]he provisions of the Nationwide policy that purport to exclude coverage entirely for damages caused by a combination of the effects of water (an excluded loss) and damage caused by the effects of wind (a covered loss) are ambiguous."

3. Nor does disagreement among courts necessarily indicate ambiguity. *See Wooten v. Miss. Farm Bureau Ins. Co.*, 924 So.2d 519, 520-21 (Miss.2006) (rejecting contention that differing judicial interpretation of the phrase "incurred within one year from the date of the accident" rendered the policy language ambiguous).

Leonard, 438 F.Supp.2d at 693.[4] Contrary to the district court's ruling, Nationwide's ACC clause is not ambiguous, nor does Mississippi law preempt the causation regime the clause applies to hurricane claims.

Eschewing a text-based analysis, the district court opines that the clause

> does not affect the coverage for other losses (covered losses), i.e., damage caused by wind, that occur at or near the same time. Thus, [the ACC clause] does not exclude coverage for different damage, the damage caused by wind, a covered peril, *even if the wind damage occurred concurrently or in sequence with the excluded water damage.* The wind damage is covered; the water damage is not.

Id. at 693 (emphasis added). This conclusion is unjustifiable when read against the clause's plain language:

> 1. We do not cover loss to any property resulting directly or indirectly from any of the following. *Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.*
>
> (. . .)

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4. The second provision to which the court alludes-the weather-conditions clause-is discussed in Section III.E.

Appendix A

2. Water or damage caused by water-borne material ....

(1) flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, *whether or not driven by wind.*

The clause unambiguously excludes coverage for water damage "even if another peril"–e.g., wind–"contributed concurrently or in any sequence to cause the loss." The plain language of the policy leaves the district court no interpretive leeway to conclude that recovery can be obtained for wind damage that "occurred concurrently or in sequence with the excluded water damage." *Leonard*, 438 F.Supp.2d at 693. Moreover, in the past we have not deemed similar policy language ambiguous. *See, e.g., Arjen Motor Hotel Corp. v. Gen. Accident Fire & Life Assurance Corp.*, 379 F.2d 265, 268 (5th Cir.1967) (affirming denial of recovery when evidence "conclusively establish [ed] that wave action, an excluded peril, at the very least contributed to the collapse of the restaurant building"). Nationwide's assertion that the district court "simply read the clause out of the contract," is not at all wide of the mark. The clause is not ambiguous.

The fatal flaw in the district court's rationale is its failure to recognize the three discrete categories of damage at issue in this litigation: (1) damage caused exclusively by wind; (2) damage caused exclusively by water; and (3) damage caused by wind "concurrently or

in any sequence" with water. The classic example of such a concurrent wind-water peril is the storm-surge flooding that follows on the heels of a hurricane's landfall. The only species of damage covered under the policy is damage caused *exclusively* by wind. But if wind and water synergistically caused the *same* damage, such damage is excluded. Thus, the Leonards' money judgment was based on their roof damages solely caused by wind. Contrary to the court's damage matrix, however, had they also proved that a portion of their property damage was caused by the concurrent or sequential action of water – or any number of other enumerated water-borne perils – the policy clearly disallows recovery.

The district court seemed to fear that enforcement of the policy's concurrent causation exclusion would render *any* recovery for hurricane damage illusory. Observing that the policy denies coverage whenever a "windstorm[ ] combined with an excluded cause of loss, e.g., flooding," the court hypothesized that "an insured whose dwelling lost its roof in high winds and at the same time suffered an incursion of even an inch of water could recover nothing . . . ." *Leonard,* 438 F.Supp.2d at 694 (discussing the weather-conditions exclusion). That fear is unfounded, with regard to the policy's wind-coverage clause, which clearly preempts the court's scenario:

> We cover accidental direct physical loss to property . . . caused by the following perils . . .
>
> (. . .)

2. windstorm or hail.

> *Direct loss caused by rain . . . driven through roof or wall openings made by direct action of wind . . . .*

If, for example, a policyholder's roof is blown off in a storm, and rain enters through the opening, the damage is covered. Only if storm-surge flooding-an excluded peril-then inundates the *same* area that the rain damaged is the ensuing loss excluded because the loss was caused concurrently or in sequence by the action of a covered and an excluded peril. The district court's unsupported conclusions that the ACC clause is ambiguous and that the policyholder can parse out the portion of the concurrently caused damage that is attributable to wind contradict the policy language.

Like the district court, the Leonards provide no support for their argument that the ACC clause is ambiguous. Instead, they adopt the district court's reliance on venerable Mississippi authorities regarding proximate causation of damage caused by hurricanes. *See Leonard*, 438 F.Supp.2d at 695 (citing cases reflecting "well-established Mississippi law"). Because the ACC clause is unambiguous, the Leonards can prevail only if they can demonstrate that the clause is prohibited by Mississippi caselaw, statutory law, or public policy. None of these sources of state law restricts Nationwide's use of the ACC clause to preclude recovery for concurrently caused hurricane losses.

Appendix A

1. Caselaw

Contrary to the Leonards' contention, Mississippi courts have not conclusively resolved whether an insurance policy may preclude recovery for damages caused by the concurrent action of the wind and water of a hurricane. Accordingly, this court, applying state substantive law, must make an educated " *Erie* guess" as to how the Mississippi Supreme Court would resolve the issue. *See Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 397 (5th Cir.1986) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)).

a. Mississippi's Default Rule: Efficient Proximate Causation

The default causation rule in Mississippi regarding damages caused concurrently by a covered and an excluded peril under an insurance policy is that the insured may recover if the covered peril was the "dominant and efficient cause" of the loss. *Evana Plantation, Inc. v. Yorkshire Ins. Co.*, 214 Miss. 321, 58 So.2d 797, 798 (1952). This rule is typically referred to as the doctrine of efficient proximate cause.[5] To recover

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5. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 2007 WL 2200004, at *26 (5th Cir. Aug.2, 2007) ("The efficient-proximate-cause doctrine applies only where two or more distinct actions, events, or forces combined to create the loss.") (citation omitted); Jeffrey Jackson, Mississippi Insurance Law and Practice § 15:44 (2007) [hereinafter Miss. Ins. Law & Prac.]; (Cont'd)

under the doctrine in the context of a homeowner's policy that covers wind damage but excludes damage by water, "it is sufficient to show that wind [i.e., the covered peril] was the proximate or efficient cause of the loss . . . notwithstanding other factors [i.e., excluded perils like water] contributed . . . ." *Lititz Mut. Ins. Co. v. Boatner*, 254 So.2d 765, 767 (Miss.1971) (quoting *Kemp v. Am. Universal Ins. Co.*, 391 F.2d 533, 535 (5th Cir.1968)).

The Mississippi Supreme Court frequently employed this default rule in the welter of insurance coverage cases

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7 Steven Plitt et al., Couch on Insurance § 101:45 (3d ed.2006) (defining the efficient proximate cause of loss as "the fundamental, efficient moving cause, i.e., the cause that is responsible for setting any and all other causes in motion") [hereinafter Couch on Ins.]; *id.* § 101:55 ("The efficient proximate cause rule permits recovery under the insurance policy for a loss caused by a combination of a covered risk and an excluded risk only if the covered risk . . . . is one that sets the other causes in motion that, in an unbroken sequence, produced the result for which recovery is sought."). Efficient proximate causation is distinct from two other etiological doctrines occasionally employed in the insurance context: independent and concurrent causation. *See, e.g., id.* § 101:49 ("When a loss is due to two or more independent concurrent causes, one covered under the policy and the other expressly excluded, an insurer is only liable for that part of the loss that is a covered loss under the terms of the policy."); *id.* § 101:55 (The "[c]oncurrent cause rule takes the approach that coverage should be permitted whenever two or more causes do appreciably contribute to the loss and at least one of the causes is a risk which is covered under the terms of the policy.").

that surfaced in the aftermath of Hurricane Camille. It is also the rule the district court and the Leonards contend must apply here. *See Leonard*, 438 F.Supp.2d at 694 (collecting cases). However, although the Mississippi Supreme Court often premised recovery for policyholders on the application of the efficient proximate cause rule, in actuality, in many of the Camille cases the court did little more than uphold jury findings that the damages suffered by policyholders were caused *exclusively by wind*, not by concurrent wind-water action.[6] Such cases thus do not support the Leonards'

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6. *See, e.g., Liberty Universal Ins. Co. v. Hall*, 289 So.2d 683, 684 (Miss.1972) ("This is simply another one of the many cases which reached this Court involving the question of whether the damage was caused by wind or water. The evidence on behalf of the appellees tended to show that the damage was caused by the wind before the water even reached the appellees' property .... There was no tidal wave."); *Lititz Mut. Ins. Co. v. Buckley*, 261 So.2d 492, 495 (Miss.1972) ("[D]amages to the house and personal property were caused by wind and rain before the rising water."); *Grace v. Lititz Mut. Ins. Co.*, 257 So.2d 217, 224 (Miss.1972) ("[T]he jury had ample testimony to sustain the appellants' contention that their office building was destroyed by wind before the tidal waters reached the property."); *Lititz Mut. Ins. Co. v. Boatner*, 254 So.2d 765, 766 (Miss.1971) ("[T]he great weight of the evidence shows that the house and its contents had already been destroyed and distributed over a large area long before the tidal wave came ashore ...."); *Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777, 781 (Miss.1971) (damages from rising water, an excluded cause, not covered). *See also Firemen's Ins. Co. of Newark, New Jersey v. Schulte*, 200 So.2d 440, 442-43 (Miss.1967) (refusing to set aside jury verdict that the dominant cause of damage was wind from Hurricane Betsy, not her tidal waters).

argument that the Mississippi default rule in hurricane cases is always to allow recovery for covered damages even if they are concurrent with excluded damages and irrespective of contrary policy language. In fact, the Mississippi Supreme Court intimated in one case that even if a covered peril is the efficient proximate cause of damage, a concurrently contributing cause that is excluded under a homeowner's policy may preclude recovery. *See Grain Dealers Mut. Ins. Co. v. Belk*, 269 So.2d 637, 640 (Miss.1972).

Whatever the effect of the efficient proximate cause doctrine in the Hurricane Camille cases, those decisions do not control the current case because none of the policies they involve contain ACC clauses similar to the one at issue here,[7] nor do those cases purport to enshrine

7. Insurers developed ACC clauses specifically in response to court decisions that applied the efficient proximate cause doctrine to resolve thorny issues of policy coverage for concurrently caused perils. *See* 7 Couch on Ins. § 101:57 ("Insurers often change the terms of their policies in periodic attempts to negate the effect of the case law regarding multiple causation set forth by various jurisdictions which may have resulted from the prior terms employed by insurers in their policies."); *Preferred Mut. Ins. Co. v. Meggison*, 53 F.Supp.2d 139, 142 (D.Mass.1999) (ACC provisions have appeared in recent years in response to concurrent-causation doctrine, under which courts have found insurers "obligated to pay for damages resulting from a combination of covered and excluded perils if the efficient proximate cause is a covered peril." (citation omitted)); *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal.3d 395, 257 Cal.Rptr. 292, 770 P.2d 704, 710 n. 6 (1989) (Homeowners' policy language changed because court decisions found coverage for losses not intended to be covered, threatening insurer insolvency in the event of a major catastrophe.).

efficient proximate causation as an immutable rule of Mississippi insurance policy interpretation. The Fifth Circuit long ago explicitly recognized that efficient proximate causation does not necessarily control Mississippi contracts for hurricane damage. *See Kemp*, 391 F.2d at 534-35 ("[I]n order to recover on a windstorm insurance policy, *not otherwise limited or defined*, it is sufficient to show that wind was the proximate or efficient cause of loss or damage . . . ." (emphasis added)). As discussed below, we reach the same conclusion here as well.

b. The Earth-Movement Cases: *Eaker, Rhoden & Boteler*

Recent decisions involving the effect of ACC clauses and earth-movement exclusions under Mississippi law all upheld ACC clauses that abrogated the default efficient proximate causation rule and excluded damage occasioned by the synergistic action of a covered and an excluded peril.[8] The cases reflect the general Mississippi contract principle that "where a clause in a contract does not violate any statute, or public policy, and is unambiguous and certain in its provisions, it is enforced as written." *Am. Bankers' Ins. Co. v. White*, 171 Miss. 677, 158 So. 346, 349 (1935); *see also Blue Cross & Blue Shield of Miss., Inc. v. Larson*, 485 So.2d 1071, 1073 (Miss.1986) (explaining parties' "privileged right . . . to

8. *See, e.g., Eaker v. State Farm Fire & Cas. Ins. Co.*, 216 F.Supp.2d 606 (S.D.Miss.2001); *Rhoden v. State Farm Fire & Cas. Co.*, 32 F.Supp.2d 907 (S.D.Miss.1998); *Boteler v. State Farm Cas. Ins. Co.*, 876 So.2d 1067 (Miss.Ct.App.2004).

contract, assuming such is not against public policy, by expressing their intentions through the language of their choice"); 7 Couch on Ins. § 101:39; Miss. Ins. Law & Prac. § 1:11..

Rhoden and *Boteler* are particularly instructive on this score. In *Rhoden*, State Farm excluded losses from earth movement (the excluded peril) under an ACC provision that barred coverage "whether other causes acted concurrently or in any sequence with the excluded event to produce the loss." 32 F.Supp.2d at 911. The federal district court held that the earth-movement exclusion, when read with the ACC provision, was unambiguously designed to preclude recovery for any loss involving earth movement, irrespective of the causal matrix that occasioned the loss. *Id.* at 912-13. The court upheld the ACC clause, noting that Mississippi courts have not adopted the efficient proximate causation doctrine. *Id.* at 912; *Boteler*, 876 So.2d at 1070. *Boteler* and *Eaker* echo *Rhoden*'s holding that ACC clauses are enforceable, absolute bars to recovery "[w]hen a loss is caused by a combination of a covered and specifically excluded risks." *See Eaker*, 216 F.Supp.2d at 623 (quoting *Rhoden*, 32 F.Supp.2d at 911); *see also Boteler*, 876 So.2d at 1069-70.[9] The leading Mississippi insurance law

9. In *Guice v. State Farm Fire & Casualty Co.*, 2006 WL 2359474 (S.D.Miss. Aug.14, 2006), a Katrina coverage case involving a concurrent-causation provision that was before the district court on a Rule 12(b)(6) motion, the court distinguished *Eaker*, *Rhoden*, and *Boteler* on the basis that "the records in [the earth-movement] cases showed that the losses would not have

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treatise states that the earth-movement cases are indicative of "the clear trend in Mississippi state and federal courts . . . to treat the issue of causation in this context as one controlled by the insurance policy, and not by public policy or common law." Miss. Ins. Law & Prac. § 15:15.

c. Other Jurisdictions

Two federal appellate courts and many state and district courts have endorsed using ACC clauses to circumvent default causation rules like efficient proximate cause. For instance, in *TNT Speed & Sport Center, Inc. v. American States Insurance Co.*, 114 F.3d 731 (8th Cir.1997), a vandal removed sandbags from a levee protecting a go-cart track from the waters of the Mississippi River. As a result, the levee collapsed and river water damaged TNT's buildings. The insurance policy covered losses caused by vandalism, but excluded flood losses, and contained an ACC clause that excluded coverage for damage arising concurrently from a covered and an excluded peril. After a review of Missouri cases, the Eighth Circuit held that state law did not bar application of the ACC clause, and that the "plain meaning of the [ACC clause's] exclusionary language was to directly address, and contract out of, the efficient

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occurred in the absence of the excluded event." *Id.* at *4. It is undisputed that the lion's share of the losses to the Leonards' property would not have occurred but for the storm-surge damage, a fact that reinforces the application of the earth-movement cases as persuasive authority here.

proximate cause doctrine." 114 F.3d at 733; *see id.* (collecting state supreme court decisions upholding ACC clauses). *See also Front Row Theatre, Inc. v. Am. Mfrs. Mut. Ins. Companies,* 18 F.3d 1343, 1347 (6th Cir.1994) (upholding an ACC clause barring coverage for concurrently caused water losses (citing *Schroeder v. State Farm Fire & Cas. Co.,* 770 F.Supp. 558, 561 (D.Nev.1991)). A majority of states that have considered the matter enforce ACC exclusion clauses. *See* 4 David L. Leitner et al., Law and Practice of Insurance Coverage Litigation § 52:37 (2007); 7 Couch on Ins. § 101:45; Joseph A. Ziemianski et al., *Emerging Property and CGL Insurance Claims Trends,* 742 Practising Law Institute Litigation and Administrative Practice Course Handbook Series 251, 281 & n.111 (2006). Only Washington and West Virginia do not allow abrogation of the default rule via an ACC clause.[10] California and North Dakota require efficient proximate causation by statute.[11]

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10. *See Murray v. State Farm Fire & Cas. Co.,* 203 W.Va. 477, 509 S.E.2d 1, 12 (1998) ("We hold that, when examining whether coverage exists for a loss under a first-party insurance policy when the loss is caused by a combination of covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss."); *Safeco Ins. Co. of Am. v. Hirschmann,* 112 Wash.2d 621, 773 P.2d 413, 416-17 (1989) ("When an insured risk sets into operation a chain of causation in which the last step may be an excluded risk, the exclusion will not defeat recovery.").

11. *See Julian v. Hartford Underwriters Ins. Co.,* 35 Cal.4th 747, 27 Cal.Rptr.3d 648, 110 P.3d 903, 904 (2005) ("We have

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2. Public Policy

A general background principle of Mississippi contract law holds that parties may decline to adopt common-law causation rules so long as the contract's provisions do not offend public policy. *See Miss. Farm Bureau Cas. Ins. Co. v. Britt*, 826 So.2d 1261, 1266 (Miss.2002) ("We must give effect here to [a] valid, clear and unambiguous contract term where there is no statutory or public policy prohibition nullifying it."); *see also* 7 Couch on Ins. § 101:39. As Mississippi has not adopted the efficient proximate cause doctrine as a matter of public policy, there is no bar to Nationwide's use of the ACC clause here. Most jurisdictions concur that ACC clauses comport with state public policy. The Alabama Supreme Court's recent decision in *State Farm Fire & Casualty Co. v. Slade*, 747 So.2d 293 (Ala.1999), is representative of this trend.

Slade involved an improbable set of events in which a lightning bolt caused the collapse of a retaining wall near the policyholders' swimming pool. Months later, cracks were observed in the interior and exterior walls of the adjacent dwelling. State Farm refused to cover the structural damage, asserting that lightning

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construed [Cal. Ins.Code] section 530 as incorporating into California law the efficient proximate cause doctrine, an interpretive rule for first party insurance."); *Western Nat'l Mut. Ins. Co. v. Univ. of N.D.*, 643 N.W.2d 4, 13 (N.D.2002) (efficient proximate cause doctrine codified at N.D. Cent.Code §§ 26.1-32-01, 26.1-32-03).

(a covered peril), caused subsequent earth movement (an excluded peril), resulting in the observed damage. The homeowner's policy contained an ACC clause substantively indistinguishable from the one contested here. *Slade* held that the occasional citation of the efficient proximate cause rule in Alabama caselaw did not require the court to invalidate the disputed ACC clause because the rule is not a "principle of public policy." 747 So.2d at 314. Instead, the court adhered to Alabama's "long-standing rule against rewriting unambiguous insurance policies so long as they do not . . . contravene public policy." *Id.* (citation and internal quotation marks omitted). As *Eaker*, *Rhoden*, and *Boteler* suggest, we believe that the Mississippi Supreme Court, if squarely confronted with the issue, would follow *Slade*.

3. Statutory Law

Nor does any Mississippi statute mandate that insurance policies reflect the efficient proximate causation doctrine. Mississippi insurance law, in fact, lends some support to Nationwide. Under state law, all insurance providers are required to file "all rates, supplementary rate information, policy forms and endorsements" with the Mississippi Department of Insurance. *See* Miss.Code Ann. § 83-2-7(1). The state Insurance Commissioner must reject any rate or policy form that contains "inconsistent, ambiguous, or misleading clauses or exceptions." *Id.* § 83-2-11(1)(b). Nationwide's ACC clause was approved by the Department.

The Mississippi Supreme Court has recently noted the public-policy import of this approval process. *See United States Fid. & Guar. Co. v. Knight,* 882 So.2d 85, 92 (Miss.2004) ("[I]nsurance companies must be able to rely on their statements of coverage, exclusions, disclaimers, definitions, and other provisions, in order to receive the benefit of their bargain and to ensure that rates have been properly calculated."); *see also* 7 Couch on Ins. § 101:54 ("Causes that fall within the policy coverage may be considered to be those that the insurer has assessed in setting its premium or that the insured would have derived from the language of the contract."). Moreover, the judicial elevation of the efficient proximate cause doctrine to a rule of contract construction after contrary policies had been approved by the state insurance commissioner would essentially usurp the legislature's authority to delegate authority to an agency. *See Slade,* 747 So.2d at 314. By analogy, it seems most likely that the Mississippi Supreme Court would regard insurance policy regulation as a matter "better suited for the Legislature to address" rather than the state judiciary. *Wooten v. Miss. Farm Bureau Ins. Co.,* 924 So.2d 519, 523 (Miss.2006).

The Leonards object to Nationwide's citation of the filed-rate doctrine, contending that it "has never been held to be an absolute bar to litigation" and would constitute "an encroachment by regulatory agencies into the court system and would deprive plaintiffs of their right to a trial by jury." This argument assumes that the insurance policy is ambiguous, since Mississippi courts will refrain from tinkering with policy language if the

meaning of a policy is clear on its face. *See State Auto. Mut. Ins. Co. of Columbus v. Glover*, 253 Miss. 477, 176 So.2d 256, 258 (1965). Since the ACC clause is unambiguous and consistent with state public policy, the Leonards' argument misses the mark.

For all these reasons, we conclude that use of an ACC clause to supplant the default causation regime is not forbidden by Mississippi caselaw (including the Camille cases which antedate such clauses), statutory law, or public policy. Because the ACC clause is unambiguous and not otherwise voidable under state law, it must stand.

E. Water-Damages Exclusion

The Leonards' only textual argument that their policy is ambiguous focuses on the water-damage exclusion, not the ACC clause. They assert that the water damage their house sustained was caused not by flooding-an explicitly excluded peril-but by "storm surge," which they characterize as a "separate, discrete peril unique to hurricanes" and as a term commonly understood "among residents of Pascagoula" as distinct from a flood.[12] Thus, the argument goes, because "[t]he

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12. The Leonards argue based on extrinsic evidence that "storm surge" has a special meaning apart from "flood" in hurricane-prone areas like Pascagoula. We need not opine on the merits of this claim because a policyholder cannot cite extrinsic evidence except to explain an ambiguity within the four corners of the policy. *See Am. States Ins. Co. v. Natchez Steam Laundry*, 131 F.3d 551, 555 (5th Cir.1998); *Heartsouth, PLLC v. Boyd*, 865

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literal wording of the 'water damage' exclusion does not contemplate the exclusion of [damage from] 'storm surge,' " recovery is available. *See* 11 Couch on Ins. § 153:48 ("Because exclusions are read narrowly, a policy excluding damage from some natural water-related perils may cover damage from other natural water phenomena."). This argument is unpersuasive.

Courts have interpreted water-damage exclusions like the one found in the Leonards' policy to encompass the peril of wind-driven inundation by water, or storm surge, for ages.[13] Mississippi courts have upheld such

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So.2d 1095, 1105 (Miss.2003). Even so, the authority cited in support of the Leonards' proposition, *Red Panther Chem. Co. v. Ins. Co. of Penn.*, 43 F.3d 514 (10th Cir.1994), is less than convincing on this score. *Red Panther* applied Mississippi law to a set of Palsgrafian facts and a pollution exclusion clause. After a general invocation that insurance policies should be "construed in light of the circumstances in which they were issued and according to common usages," *id.* at 517, the Tenth Circuit held the exclusion ambiguous. The court specified, however, that its holding involved "unique factual circumstances" and a policy provision "not yet . . . the subject of extensive litigation." *Id.* at 519. In contrast, the instant water-damages clause is practically indistinguishable from provisions used in insurance policies for two centuries, and hurricane damage is anything but novel.

13. The Third Circuit rejected a strikingly similar storm-surge argument in 1916. *See Newark Trust Co. v. Agric. Ins. Co.*, 237 F. 788, 788 (3d Cir.1916) (holding that wind-driven storm surge was an excluded peril under a flood exclusion and rejecting policyholder's contention that because "the water was made high,
(Cont'd)

exclusions before and after Hurricane Katrina. *See Leonard*, 438 F.Supp.2d at 693 (collecting cases); *Bilbe v. Belsom*, 2007 WL 2042437, at *4 (E.D.La. July 12, 2007) (holding on the basis of a nearly–identical exclusion that "Plaintiff's argument that 'hurricane waters' or 'storm surge' do not fit within the terms set forth in the water damage exclusion is without merit. The damage to Plaintiff's home was caused by the inundation of her home by what was clearly tidal water from Lake Pontchartrain . . . .").[14] Further, this court's

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not by normal tidal influences, but by wind, the element insured against, and that in driving the water against the foundations of the house, the water was the passive and the wind the efficient force which proximately caused its destruction"); *see also Nat'l Fire Ins. Co. v. Crutchfield*, 160 Ky. 802, 170 S.W. 187, 187-88 (1914) (policy excluding "damage occasioned directly or indirectly by . . . tidal wave" interpreted to exclude "loss by water being driven by the wind during a flood," i.e., storm surge); *Wootton Hotel Corp. v. N. Assurance Co.*, 57 F.Supp. 112, 113 (E.D.Pa.1944) (water-damages exclusion precludes coverage for damage "caused by high water driven by wind").

14. *See also Buente v. Allstate Property & Cas. Ins. Co.*, 2006 WL 980784, at *1 (S.D.Miss. April 12, 2006) (finding that "[water-damage] exclusions are drawn quite broadly" and clearly include storm-surge damage); *Tuepker v. State Farm Fire & Cas. Co.*, 2006 WL 1442489, at *3 (S.D.Miss. May 24, 2006) (unpublished) (" 'storm surge' [losses] are excluded from coverage because this damage was caused by the inundation of plaintiffs' home by tidal water"); Russell G. Donaldson, *What Is "Flood" Within Exclusionary Clause of Property Damage Policy*, 78 A.L.R. 4th 817 § 2[a] (1990) (noting "little disagreement among the courts" that "storm tide" constitutes a flood).

most recent consideration of the term "flood" also supports Nationwide's contention that the term is unambiguous and has a concrete meaning, whether or not used in the context of an insurance policy. *See In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 2007 WL 2200004, at *16-*18 (5th Cir. Aug.2, 2007) (considering the term in the context of water damage resulting from the "failure of a structure such as a dam or dike"). No decision of this court or any other of which we are aware endorses the Leonards' view that storm surge is a unique meteorological phenomenon not contemplated by water-damages exclusions like Nationwide's.

The provision explicitly exempts from coverage damage caused by "flood . . . waves, tidal waves, [and] overflow of a body of water . . . *whether or not driven by wind.*" (Emphasis added). The phrase "storm surge" is little more than a synonym for a "tidal wave" or wind-driven flood, both of which are excluded perils.[15] The

15. *See, e.g.*, Webster's Third New International Dictionary 2390 (1976) (defining "tidal wave" as "an unusual rise of water alongshore due to exceptionally strong winds."); Federal Emergency Management Agency, Hurricane Hazards: Storm Surge, *available at http:// www. fema. gov/ hazard/ hurricane/ hu_ surge. shtm* ("Storm surge is simply water that is pushed toward the shore by the force of the winds swirling around the storm. This advancing surge combines with the normal tides to create the hurricane storm tide . . . . This rise in water level can cause severe flooding in coastal areas."). Additionally, this Circuit has previously defined "flood" as "water which inundates an area of the surface of the earth where it ordinarily would not be expected to be." *Fla. E. Coast Ry. Co. v. United States*, 519 F.2d 1184, 1192 (5th Cir.1975); *see also* 11 Couch on Ins. § 153:54 (defining flood).

omission of the specific term "storm surge" does not create ambiguity in the policy regarding coverage available in a hurricane and does not entitle the Leonards to recovery for their flood-induced damages. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 2007 WL 2200004, at *27 (5th Cir. Aug.2, 2007) (stating in the context of an ACC clause that "an insured may not avoid a contractual exclusion merely by affixing an additional label or separate characterization to the act or event causing the loss." (citation omitted)); 7 Couch on Ins. § 101:39.

F. Weather-Conditions Exclusion

Neither party briefed or argued the applicability of the weather-conditions exclusion[16] in the district court, nor has Nationwide alleged that the exclusion bars recovery. The district court raised the issue *sua sponte* in its Memorandum Opinion, finding the provision ambiguous and unenforceable. *See Leonard*, 438 F.Supp.2d at 694. Both parties agree that the district court exceeded the scope of the inquiry necessary to

16. The exclusion states in pertinent part:

> (2) We do not cover loss to any property resulting directly or indirectly from the following if another excluded peril contributes to the loss:
>
> (. . .)
>
> c. Weather conditions, if contributing in any way with an exclusion listed in paragraph 1 of this Section.

resolve this case by ruling on the weather-conditions exclusion. We accordingly do not consider that provision and vacate that portion of the district court's opinion.

G. Negligent Misrepresentation Claim

Finally, the Leonards claim that misrepresentations Fletcher made during two conversations in 1989 and 1999 effected an oral modification of their policy, enabling recovery for all Katrina-related losses. The district court allowed litigation of the question whether Fletcher negligently misrepresented the policy's terms, but found that none of Fletcher's statements "could be reasonably understood to alter the terms of the Nationwide policy," and that any inferences that Paul Leonard drew from the conversations were inconsistent with the policy exclusion for water damage. *Leonard*, 438 F.Supp.2d at 692.

1. Background Principles

Under Mississippi law, a party's reliance on representations by an insurance agent that contradict the policy language is unreasonable. *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 464 (5th Cir.2003). The insured has an affirmative duty to read the policy. *Smith v. Union Nat'l Life Ins. Co.*, 286 F.Supp.2d 782, 788 (S.D.Miss.2003); *Gulf Guar. Life Ins. Co. v. Kelley*, 389 So.2d 920, 922 (Miss.1980). Whether the policy was read or not, however, constructive knowledge of its contents is imputed to the policyholder. *Ross*, 344 F.3d at 464 (quoting *Godfrey, Bassett & Kuykendall Architects, Ltd.*

v. Huntington Lumber & Supply Co., Inc., 584 So.2d 1254, 1257 (Miss.1991)). An agent's oral representations can modify the policy only if it is ambiguous; when the contractual language is plain, there can be no modification. *Am. States Ins. Co. v. Natchez Steam Laundry*, 131 F.3d 551, 555 (5th Cir.1998).

General agency law controls the relationship between insurance companies and their agents. *Barhonovich v. Am. Nat'l Ins. Co.*, 947 F.2d 775, 777 (5th Cir.1991). Under Mississippi law, an agent's representations that purport to modify the insurance contract can bind an insurer only if the statements were made pursuant to actual or apparent authority. *Id.* Because Nationwide does not authorize its agents to orally modify contracts, only apparent authority is pertinent here.

Somewhat tautologically, the Mississippi Supreme Court has explained that "[a]pparent authority exists when a reasonably prudent person, having knowledge of the nature and usages of the business involved, would be justified in supposing, based on the character of the duties entrusted to the agent, that the agent has the power he is assumed to have." *Ford v. Lamar Life Ins. Co.*, 513 So.2d 880, 888 (Miss.1987). A policyholder seeking to recover based on an agent's apparent authority must show three things: (1) acts or conduct on the part of the principal indicating the agent's authority; (2) reasonable reliance on those acts; and (3) a detrimental change in position as a result of such reliance. *See Barhonovich*, 947 F.2d at 778 (citing *Andrew*

Jackson Life Ins. Co. v. Williams, 566 So.2d 1172, 1181 (Miss.1990)). The insured is bound by policy language that would put a reasonable person on notice of limitations to the agent's authority. *See Union Nat'l*, 286 F.Supp.2d at 788.

2. Fletcher's Conversations with Paul Leonard

Upon purchase of the policy in 1989, Paul Leonard alleges that Fletcher assured him that all hurricane damage was covered; in 1999, Fletcher allegedly assured Leonard that he did not need to purchase additional flood insurance. The Leonards argue that these oral misrepresentations modified their insurance coverage.

As a threshold matter, it is not at all clear whether the Leonards are proceeding under a tort or a contract theory. They contend in their opening brief that the district court failed to adjudicate their contractual "oral modification" claim. The Leonards pled, however, only "equitable fraud"[17] (Count Eight) and fraud claims sounding in tort (Counts Nine and Ten). The complaint contains no contract claims at all.

The Leonards attempt to obscure this discrepancy by explaining that the allegations of their detrimental reliance on Fletcher's statements, when coupled with their equitable estoppel claim (Count Two), amount to

17. The tort of "equitable fraud" differs from species of "legal fraud" like fraudulent or negligent misrepresentation only insofar as the equitable fraud lacks a scienter requirement. *See Brown v. Ohman*, 43 So.2d 727, 744-45 (Miss.1949).

"what may more broadly be termed a claim based on 'oral modification' of an insurance contract." They argue this without ever intoning the word "oral" or "modification" in their pleadings. Even were we to credit this explanation, the Leonards' further allegation that the district court failed to adjudicate their modification claim is wrong: the court explicitly stated that "Fletcher did not materially misrepresent the terms of the Nationwide homeowners policy to the Leonards, and *Fletcher* did not make any statements which could be reasonably understood to alter the terms of the Nationwide policy." *Leonard*, 483 F.Supp.2d at 691-92 (emphasis added). The oral modification claim was addressed and rejected, assuming it was ever presented in the first place. Nonetheless, whether they proceed under a misrepresentation theory or a contract-modification theory, the Leonards lose on both scores. The district court should never have considered the argument because Fletcher's statements are irrelevant to interpreting this policy as a matter of Mississippi insurance law.

3. Negligent Misrepresentation Theory

The Leonards fail to present an actionable claim of negligent misrepresentation because they cannot prove two of the elements required to show apparent authority. First, Nationwide's conduct in no way indicated that Fletcher was authorized to orally modify policies he sold.

Appendix A

The Form HO-23-A has an integration clause specifically disclaiming the agent's ability to do so:

> HOW YOUR POLICY MAY BE CHANGED
>
> (. . .)
>
> (c) A waiver or change of a part of this policy must be in writing by use to be valid. Our request for an appraisal or examination does not waive our rights.

Paul Leonard admits to having read the policy. Even had he not, knowledge of the integration clause is imputed to him under state law.[18] Only "[t]hose dealing with

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18. The cases the Leonards cite in support of their claim are readily distinguishable from the instant facts. In *Nichols v. Shelter Life Insurance Co.*, 923 F.2d 1158, 1163 (5th Cir.1991), the policy contained no express statement that the insurer disclaimed any representations made by an agent that were contrary to the written policy. Moreover, both *Nichols* and *Scott v. Transport Indemnity Co.*, 513 So.2d 889 (Miss.1987), involve fraudulent inducement to sign new policies, not oral modifications of existing policies. *Nichols*, 923 So.2d at 1160; *Scott*, 513 So.2d at 894 (holding restricted to agent's statements "before or contemporaneous with entering into the insurance contract"). In *Andrew Jackson Life Insurance Co. v. Williams*, 566 So.2d 1172, 1182 (Miss.1990), "absolutely no oral or written notice of existent policy condition or breadth of agents' authority was provided [plaintiffs, who] . . . were not afforded an opportunity to become properly informed through inspection of sample policies, brochures, *or anything*, and discover that the agents'

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agents without notice of restrictions upon the agent's authority have a right to presume that their authority is there." *Hollins,* 830 So.2d at 1237 (citation omitted).

Second, the Leonards' reliance on Fletcher's statements was objectively unreasonable in light of the policy language clearly excluding water damage, including damage caused by a flood. *See supra* Section III.D.

And even if the Leonards can satisfy the third element of apparent authority–detrimental change in position–their misrepresentation claim is stale. The most recent statements the Leonards cite were uttered six years ago in 1999. The statute of limitations for negligent misrepresentation in Mississippi is three years. *See* Miss.Code Ann. § 15-1-49. Because the policy terms are unambiguous, the Leonards' claim accrued at the time the misrepresentation was made. *See Oaks v. Sellers,* 953 So.2d 1077, 1082 (Miss.2007) (action for misrepresentation of policy terms accrues at execution); *Carter v. Citigroup, Inc.,* 938 So.2d 809, 818 (Miss.2002); *Watts v. Horace Mann Life Ins. Co.,* 949 So.2d 833, 835-

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offers wrongfully contravened unrevealed policy conditions." (emphasis in original) (internal quotation marks omitted). And in *American Income Life Insurance Co. v. Hollins,* 830 So.2d 1230, 1238 (Miss.2002), the insured "was not given notice of the exclusion at the time of relying on the agent's misrepresentation." None of these cases supports the Leonards' argument that their misrepresentation claim survives notwithstanding the integration clause.

36 (Miss.Ct.App.2006) (claim that ambiguous policy tolled statute of limitations rejected because policy language was plain). The claim is time-barred.

4. Oral Modification Theory

There are at least two reasons why the Leonards' contract-based claim fails as well. First, the policy's integration clause pretermits the claim as a matter of law.[19] *See Stephens v. Equitable Life Assurance Soc'y*, 850 So.2d 78, 83 (Miss.2003) ("Any alleged oral agreement . . . does not have any effect on the written insurance contract . . . . [that] had a general provision that unambiguously prohibited any oral modification."). The Leonards do not allege that the provision permitting only written modification of the policy has itself been modified. *See, e.g., Eastline Corp. v. Marion Apartments, Ltd.*, 524 So.2d 582, 584 (Miss.1988) (dispositive issue "whether or not the parties waived the stipulation that all modifications be in writing").[20]

---

19. Although the parol evidence rule is not a bar to evidence of a subsequent contract modification, *see Dixie S. Indus. Coating, Inc. v. Miss. Power Co.*, 872 So.2d 769, 772 (Miss.Ct.App.2004), the rule is activated only upon the discovery of ambiguity in a contract and is thus inapplicable here. *Smith v. Smith*, 872 So.2d 74, 78 (Miss.Ct.App.2004) ("Parol evidence of the intention of the parties may be received to clear up an ambiguity by reason of which, such intention is not definitely expressed." (quoting *Byrd v. Rees*, 251 Miss. 876, 882, 171 So.2d 864, 867 (1965))).

20. Although *Eastline* also states that "[a]n oral modification may be made even where the contract provides that

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Instead, they argue that their pleading of equitable estoppel obviates entirely the need to resort to the integration clause. That claim ignores the rule that doctrines like equitable estoppel that allow insureds to procure rights at variance with a written insurance policy cannot be used to extend coverage not otherwise provided by the policy. *See Kubow v. Hartford Cas. Ins. Co.*, 475 F.3d 672 (5th Cir.2007); *St. Paul Fire & Marine Ins. Co. v. Vest Transp. Co.*, 666 F.2d 932, 948 (5th Cir.1982) ("[C]onditions going to coverage or scope of policy of insurance, as distinguished from those furnishing a ground for forfeiture, may not be waived by implication from conduct or action."); *Morris v. Am. Fidelity Fire Ins. Co.*, 253 Miss. 297, 173 So.2d 618 (1965).

Second, Mississippi law requires that oral modification correspond to general rules of contract formation, like the meeting-of-the-minds requirement. *See, e.g., Rottenberry v. Hooker*, 864 So.2d 266, 270 (Miss.2003). The Leonards do not contend that Fletcher said that the HO-23-A policy covered all hurricane damage; instead, they contend that Fletcher stated they did not need additional hurricane coverage because they did not live in an area classified Flood Zone A by FEMA. From this, Paul Leonard inferred that the policy covered hurricane damage. *See Leonard*, 438 F.Supp.2d at 691.

(Cont'd)

modification must be in writing," 524 So.2d at 584, that statement was supported by authority holding that "a course of dealing [between the parties] which repeatedly disregards such stipulation" may amount to waiver. *Id.* (citation omitted). That situation is not present here.

That inference does not provide the mutual assent necessary to modify the contract. The Leonards' additional claim that equitable estoppel does not require mutual assent is irrelevant because estoppel cannot operate to create hurricane coverage that does not exist under the policy.

Whether the Leonards proceed under a contract or tort claim, their allegation that Fletcher's comments entitle them to additional coverage is incorrect as a matter of Mississippi law, and requires us to reverse the district court's contrary holding.

5. Fletcher's Conversations with Other Policyholders

In addition to the district court's error regarding claims based on statements made to the Leonards, the district court additionally abused its discretion in considering evidence of statements made by Fletcher to policyholders *other than* the Leonards. Over Nationwide's objection, the district court admitted statements Fletcher made to five Nationwide policyholders as "habit" evidence under Federal Rule of Evidence 406 because "there was enough evidence . . . as a matter of habit and routine, [that Fletcher] expressed his opinion, when he was asked, that customers should not purchase flood insurance unless they lived in a flood prone area . . . ." *Leonard*, 438 F.Supp.2d at 690. Admission of the oral statements under Rule 406 was a clear abuse of discretion. The Leonards failed to respond to Nationwide's briefing on this issue.

Rule 406's use of the term "habit" suggests a "regular response to a repeated specific situation" that has become "semi-automatic." *Reyes v. Mo. Pac. R.R. Co.*, 589 F.2d 791, 794 (5th Cir.1979); *see also Pursley v. Dretke*, 114 Fed.Appx. 630, 634 (5th Cir.2004) (unpublished) ("habit" means "a specific reaction to a specific set of stimuli that is reflexive, repeated, and invariable in nature."). Fletcher has about fifteen hundred customers. Comments he purportedly made to five of them over the course of a decade about the need for additional flood coverage do not remotely qualify or quantify as a habit within the meaning the Rule 406. The record demonstrates that Fletcher sold nearly two hundred NFIP supplemental policies in the years preceding Katrina-twelve of them to policyholders living in the Leonards' neighborhood. Evidence was lacking to suggest that Fletcher's statements to other policyholders revealed an invariable, reflexive response to his treatment of inquiries about supplemental flood insurance. Admission of the statements under Rule 406 was an abuse of discretion.

III. CONCLUSION

Subject to the foregoing explanation of the trial court's errors, we AFFIRM.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION DECIDED AUGUST 15, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:05CV475 LTS-RHW

PAUL LEONARD and JULIE LEONARD,

Plaintiffs,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant.

MEMORANDUM OPINION

This cause came on for trial by the court, sitting without a jury. Having heard the evidence presented by the parties and having considered the arguments of counsel, I make the following findings of fact and conclusions of law:

Appendix B

FINDINGS OF FACT

1. Plaintiffs Paul and Julie Leonard (the Leonards) reside at 1010 Washington Avenue, Pascagoula, Mississippi.

2. Defendant Nationwide Mutual Insurance Company (Nationwide) is a corporation organized under the laws of Ohio with its principal place of business there.

3. Jay Fletcher (Fletcher) is a local Nationwide representative who works in the Pascagoula, Mississippi, market. Fletcher was the Nationwide representative with whom the Leonards did business. Fletcher was a party defendant to this action when it was filed in the Chancery Court of Jackson County, Mississippi. After Nationwide removed the case from state court, all claims against Fletcher personally were dismissed.

4. It is undisputed that the Leonards' residence was extensively damaged during Hurricane Katrina, a powerful storm that made landfall on the Mississippi Gulf Coast on August 29, 2005. The primary disputes are the cause of the damage, the extent of the damage, and the question whether Nationwide is legally obligated to reimburse the Leonards for any or all of this damage.

5. At the time Hurricane Katrina damaged the Leonards' residence, their property was insured under a homeowners insurance policy issued by

Nationwide. This policy has been identified in the record as policy number 63 23 MP 559938, form HO 23A. (the policy or the Nationwide policy)

6. The Leonards' residence was not covered by any policy of flood insurance at the time of the storm. Flood insurance was available prior to Hurricane Katrina under the National Flood Insurance Program. Under federal regulations that apply to this program, residential areas are classified according to the estimated risk of flooding. Areas most prone to flooding are designated Flood Zone A, those less susceptible to flooding are designated Flood Zone B, and those areas even less prone to flooding are designated Flood Zone C. Flood insurance is available to anyone, regardless of which flood zone their residence is situated in.

7. The Nationwide policy in force at the time of Hurricane Katrina contains the following relevant provisions:

Insuring Agreement

We will provide the insurance described in this policy, which includes the Declarations and attached endorsements or schedules, in return for the premium and fees, and compliance with all the policy provisions.

* * *

Appendix B

Section I
Property Coverages

Coverage Agreement

Coverage A-Dwelling
We cover:

1. The dwelling on the residence premises used mainly as your private residence, including attached structures . . .

* * *

Coverage B-Other Structures
We cover other structures on the residence premises. They must be separated from the dwelling by clear space . . .

* * *

Coverage C-Personal Property
We cover personal property owned or used by an insured at the residence premises.

* * *

Perils Insured Against
(Section I)
Covered Causes of Loss
Coverage A-Dwelling and
Coverage B-Other Structures

Appendix B

We cover accidental direct physical loss to property described in Coverages A and B except for losses excluded under Section I - Property Exclusions.
Coverage C - Personal Property
We cover accidental direct physical loss to property described in Coverage C caused by the following perils except for losses excluded under Section I-Property Exclusions:

* * *

2. Windstorm or hail.
   Direct loss caused by rain, snow, sleet, sand or dust driven through roof or wall openings made by direct action of wind, hail, or other insured peril is covered.

* * *

Property Exclusions
(Section I)

1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.

* * *

   b) Water or damage caused by water-borne material. Loss resulting from water or

water-borne material damage described below is not covered even if other perils contributed, directly or indirectly to cause the loss. Water and water-borne material damage means:

(1) flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind.

* * *

n) Windstorm or hail to any:

(1) structure, other than a building, including the supports and screens, with a roof-like covering of cloth, metal, plastic or fiberglass, whether or not the structure is attached to a building.

(2) screens, including their supports, around a pool, patio or other areas.

(3) property lines and similar walls, including seawalls, greenhouses, hothouses, slathouses, trellis, pergolas, cabanas and outdoor equipment used to service the residence premises.

(4) structure, including property in or on the structure, which is in whole or part, in or over water.

Appendix B

2. We do not cover loss to any property resulting directly or indirectly from the following if another excluded peril contributes to the loss:

* * *

c) Weather conditions, if contributing in any way with an exclusion listed in paragraph 1 of this Section.

8. The evidence presented at trial conclusively established that on August 29, 2005, the entire area surrounding Pascagoula, Mississippi, including the Leonard residence and its surrounding neighborhood, was subjected to violent winds in excess of 100 miles per hour. These winds increased gradually in the early morning hours and reached a peak of intensity between 9:00 a.m. and noon. Water from the Mississippi Sound was driven ashore by the storm, and the water level in the Leonard neighborhood rose to a peak level between 11:00 a.m. and noon. At its highest point, this water inundated the Leonard residence to a depth of approximately five feet.

9. The Leonard residence is approximately 12 feet above sea level. This property is 515 feet from the beachfront to the south.

10. The inundation of the ground floor of the Leonards' residence caused extensive damage to the floors, carpets, walls, and personal property situated therein. The second floor of the Leonards' property was not damaged. The physical damage to the roof of the Leonards' property consisted of a small number of broken shingles, and the water-tight integrity of the roof was not breached during the storm. The attached garage on the Leonards' property was also extensively damaged during the storm.

11. The only wind damage on the ground floor of the Leonards' residence was a hole in one window that witnesses described as "golf-ball sized." The exterior of the Leonards' home and the attached garage were soiled by a combination of wind-driven materials and water-borne materials.

12. The doors of the garage were damaged by both wind and water. These doors face west.

13. Following an inspection of the Leonards' property, Nationwide made an estimate of the wind damage sustained during the storm. The Nationwide adjustor found that the wind had caused damage to the shingles of the roof and that a tree was blown down across a fence. The adjustor authorized payment for these items of damage.

14. After applying the $500 deductible, Nationwide tendered a check to the Leonards in the amount of $1,661.17.

15. The Leonards estimated the total damages from the storm to be $130,253.49. This figure included all of the damages to the Leonard residence, regardless of whether the cause of the damage was wind or water. The Leonards' experts identified $47,365.41 in damages that they attribute to wind. This estimate includes the cost of replacing the roof and extensive structural repairs to the garage.

16. During 1989, when the Leonards' property was covered by a homeowners policy issued by Allstate Insurance Company (Allstate), Allstate decided to stop issuing homeowners policies for properties located south of United States Highway 90. The Leonards' policy was, therefore, not renewed by Allstate.

17. In seeking replacement coverage, the Leonards decided to do business with Nationwide through Fletcher. The Leonards purchased their first Nationwide homeowners policy from Fletcher in 1989. This policy was entitled a Deluxe Homeowners Policy, and it was written on a Nationwide Form entitled "Elite II." In 2003, the form of the Nationwide homeowners policy changed. The replacement policy form was designated Form No. HO-23. In 2004, the form changed once again. The new form was designated Form No. HO-23A, and it was this form of the Nationwide homeowners policy that was in force at the time of Hurricane Katrina.

18. During 1999, Paul Leonard met with Fletcher to discuss a proposed increase in the wind/hail deductible that was being instituted by Nationwide with respect to its existing homeowners policies. This was the only relevant conversation between Leonard and Fletcher established by the testimony at trial. I accept Leonard's recollection of this conversation. The proposed increase would have changed the Leonards' deductible for damage caused by wind and hail from $500 to 2% of the insured value of the property. To avoid this change, the Leonards agreed to pay a higher insurance premium. During this conversation, the Leonards also increased their coverage for tools from $2,000 to $3,000, and they increased their coverage for guns from $2,000 to $3,000. During this same conversation, Paul Leonard, who had never experienced flooding to his home and who did not live in Flood Zone A, asked Fletcher whether he (Leonard) needed to purchase flood insurance coverage. Fletcher told Leonard that he (Leonard) did not need that type of coverage.

19. Fletcher did not carry flood insurance on his own property, and his office assistant, Cindy Byrd Collins, did not carry flood insurance on her property.

20. Fletcher sometimes discouraged his clients from purchasing flood insurance policies. That much is clear from the testimony of a variety of witnesses, including Fletcher's office assistant, Cindy Byrd

Collins. There was enough evidence on this point to warrant the conclusion that Fletcher, as a matter of habit and routine, expressed his opinion, when he was asked, that customers should not purchase flood insurance unless they lived in a flood prone area (Flood Zone A) where flood insurance was required in connection with mortgage loans. But between 2001 and the time of Hurricane Katrina, Fletcher sold approximately 187 flood insurance policies in the Pascagoula area. Fletcher sold 12 flood insurance policies in the neighborhood where the Leonards live. There was no testimony from which I can discern the reason Fletcher discouraged some of his clients from purchasing flood insurance policies, the reason Fletcher did not have flood insurance on his own property, or the reason he did sell 187 flood policies in the Pascagoula area and a dozen flood policies in the Leonard neighborhood.

21. Fletcher earns a commission of 15% of the premium for the sale of a homeowners policy and for the sale of a flood insurance policy.

22. Nationwide is among the privately-owned insurers who are qualified to write and sell flood insurance coverage. Nationwide and its agents earn a commission on the premiums for the flood insurance policies it sells, but the losses are ultimately paid by the taxpayers under the National Flood Insurance Program. The terms of the flood policies Nationwide and other private insurers sell are identical, as are the premiums these insurers

charge. The premiums and policy terms are set by applicable federal regulations.

23. Applicable federal regulations require flood insurance in certain circumstances. When a federally-insured lender takes a security interest in improvements on real estate situated in an area that has been designated Flood Zone A, the lender must require the borrower to purchase flood insurance for the property. Outside the area designated as Flood Zone A, flood insurance is optional and relatively inexpensive. Maximum coverage of $250,000 for structures and $100,000 for contents is now available (and was available during 2005) for less than $400 per year.

24. According to the testimony of Paul Leonard, his 1999 conversation with Fletcher concerning the question of whether he (Leonard) should purchase a flood insurance policy was prompted by the public discussion in the Pascagoula area that followed Hurricane Georges in 1998. These public discussions centered on the fact that standard homeowners insurance policies did not cover flood damage and that a separate flood insurance policy was necessary to protect against flood losses associated with hurricanes.

25. Fletcher was authorized by Nationwide to interpret and explain the coverages provided under Nationwide's policies. Nationwide consistently informed its policy holders that they should direct

all questions concerning their coverage to its local agent, in this instance Fletcher.

26. In its billing statements, sent at the time its policies were renewed, Nationwide notified its policy holders, including the Leonards, that the Nationwide homeowners policy did not cover flood loss and that a flood insurance policy was available through the National Flood Insurance Program. Nationwide also advised its policy holders to contact its local agents, in this instance Fletcher, concerning the purchase of flood insurance.

27. Paul Leonard made his inquiry to Fletcher seeking his advice whether it would be advisable for him (Leonard) to purchase a flood insurance policy, and when Fletcher ventured his opinion that the purchase of such a policy was not necessary, Leonard refrained from buying a flood policy. There was no discussion of the reason Fletcher did not believe Leonard needed to buy a flood insurance policy. Leonard apparently inferred that Fletcher's reason for advising him that he did not need a flood policy was that his homeowners policy would cover any and all water damage that might occur during a hurricane. This was an erroneous inference, and one that might have been avoided had either party to the conversation been more articulate in his inquiry or in his response.

28. Fletcher did not materially misrepresent the terms of the Nationwide homeowners policy to the

Leonards, and Fletcher did not make any statements which could be reasonably understood to alter the terms of the Nationwide policy. Fletcher did not tell Paul Leonard that he did not need a flood insurance policy because his homeowners policy would cover all water damage that might occur during a hurricane. Leonard apparently inferred that this was the reason Fletcher told him he did not need to buy a flood insurance policy, but Fletcher did not give any reason for his response to Leonard's inquiry.

29. There is no evidence in the record to establish the standard of care applicable to an insurance agent who is asked about the advisability of purchasing flood insurance. Absent proof of this standard of care, there is insufficient evidence to support a finding that Fletcher's statements to Paul Leonard indicating that he (Leonard) did not need to purchase a flood insurance policy breached a standard of care that governed Fletcher's conduct as an insurance agent in these particular circumstances. Fletcher's statement was advisory in nature, and the statement was made in circumstances in which it was reasonably foreseeable that Leonard would rely upon it. But there is no evidence to support the conclusion that this statement was made negligently. The statement embodied Fletcher's opinion, but it did not contain a reason for that opinion. In my view, Fletcher's statement was not a representation of existing fact, and it was not, in these particular circumstances, a misrepresentation of fact.

Appendix B

30. Paul Leonard inferred, according to my understanding of his testimony, that both wind damage and water damage would be covered under his Nationwide homeowners policy if the wind and water damage occurred during a hurricane. Fletcher did not tell Leonard that, but Leonard inferred as much. That inference was erroneous, and it was inconsistent with the policy exclusion for water damage. Paul Leonard knew flood insurance was available and optional, and he testified that his inquiry to Fletcher was prompted by the public discussion of insurance coverages applicable to flooding associated with Hurricane Georges. Thus, Leonard had at least some reason to understand that the water damage exclusion in the Nationwide policy would exclude flooding during a hurricane, and after reading the policy, his reliance on the inference he drew from his conversation with Fletcher was no longer reasonable.

31. Paul Leonard received his Nationwide homeowners policy number 63 23 MP 559938 shortly after it was purchased. He read the policy, according to his own testimony. He did not ask Fletcher to clarify or otherwise explain the effect of the water damage exclusion in the Nationwide policy.

32. Storm surge is a phenomenon associated with hurricanes. Atmospheric conditions and wind forces combine to force tidal waters ashore and temporarily inundate areas of normally dry land. Storm surge is a type of flooding that is covered by

flood policies sold under the National Flood Insurance Program and excluded under standard homeowners policies.

33. There was no testimony that established the standard of care for insurance agents in connection with the sale of flood insurance policies, and there was no testimony that established the standard of care for the training of insurance agents who are authorized to sell and interpret flood insurance policies.

34. The Leonards contend that Fletcher misled them by implying that their Nationwide homeowners policy would cover water damage caused by storm surge flooding. The evidence was insufficient to support this conclusion. Fletcher gave no explanation for his recommendation that Leonard not purchase a flood insurance policy, and he made no representation that suggested that the water damage exclusion in the Nationwide homeowners policy did not apply in the context of a hurricane. In fact, Fletcher and Leonard never had any discussion of specific policy provisions and coverages.

35. The Leonards' Nationwide homeowners policy provides coverage for windstorm damage, but its terms specifically exclude coverage for damage caused by water (with the specific and limited exception of water damage caused by rain that enters an insured structure after its watertight

integrity has been lost through the action of the wind). When he read his policy, this exclusion should have put Paul Leonard on notice that further inquiry was necessary concerning his understanding that the policy would cover the risk of rising water during a hurricane.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction of this action under its diversity jurisdiction, 28 U.S.C. §1332. The amount in controversy exceeds the jurisdictional minimum.

2. The provisions of the Nationwide policy that exclude coverage for damages caused by water are valid and enforceable terms of the insurance contract. Similar policy terms have been enforced with respect to damage caused by high water associated with hurricanes in many reported decisions. *Home Insurance Co. v. Sherrill*, 174 F.2d 945 (5th Cir.1949); *Lunday v. Lititz Mutual Insurance Co.*, 276 So.2d 696 (Miss.1973); *Lititz Mutual Insurance Co. v. Buckley*, 261 So.2d 492 (Miss.1972); *Grace v. Lititz Mutual Insurance Co.*, 257 So.2d 217 (Miss.1972); *Lititz Mutual Insurance Co. v. Boatner*, 254 So.2d 765 (Miss.1971); *Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777 (Miss.1971); *Firemen's Insurance Co. v. Schulte*, 200 So.2d 440 (Miss.1967).

3. The Nationwide policy provides coverage for damage caused by a windstorm, including damage

caused by water that enters an insured building through a breach in the walls or roof caused by the wind.

4. The provisions of the Nationwide policy that purport to exclude coverage entirely for damages caused by a combination of the effects of water (an excluded loss) and damage caused by the effects of wind (a covered loss) are ambiguous.

There are two provisions that purport to limit recoverable damages where concurrent causes contribute to damage the insured property. The first of these provisions reads:

Property Exclusions

(Section I)

1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss. The "loss," "such a loss," and "the loss" referred to in this paragraph, is, in this instance, damage caused by rising water during Hurricane Katrina. These three terms refer to this particular excluded loss, i.e. damage caused by rising water, but this paragraph does not affect the coverage for other losses (covered losses), i.e. damage caused by wind, that occur at or near the same time. Thus, this language does not exclude coverage for different damage, the

damage caused by wind, a covered peril, even if the wind damage occurred concurrently or in sequence with the excluded water damage. The wind damage is covered; the water damage is not.

The second of these provisions reads:

2. We do not cover loss to any property resulting directly or indirectly from the following if another excluded peril contributes to the loss:

* * *

c) Weather conditions, if contributing in any way with an exclusion listed in paragraph 1 of this Section.

Read literally, this provision would exclude any otherwise covered loss, e.g. windstorm damage, in any circumstance where "weather conditions," i.e. the windstorm, combined with an excluded cause of loss, e.g. flooding, to damage the insured property. This reading of the policy would mean that an insured whose dwelling lost its roof in high winds and at the same time suffered an incursion of even an inch of water could recover nothing under his Nationwide policy. Read literally, this provision would exclude all coverage when a windstorm did damage to both an insured dwelling (a covered loss) and adjacent "screens, including their supports, around a pool, patio, or other areas." (an excluded loss). I do not believe this is a reasonable interpretation of the policy.

Appendix B

A windstorm is a weather condition that is specifically included in the coverage of this policy. When the policy is read as a whole, I find that this exclusionary provision is ambiguous—the policy as a whole providing explicitly for windstorm coverage in one section and purportedly excluding the same coverage on the grounds that a windstorm, a "weather condition," and an excluded peril, a flood, occurred at approximately the same time. The most reasonable interpretation for these conflicting policy provisions is that this policy provides coverage for windstorm damage, in accordance with its terms, and that coverage is not negated merely because an excluded peril (in this case storm surge flooding) occurs at or near the same time.

If this second provision were read to exclude wind damage that occurs at or near the time that any excluded water damage occurs, the result would be contrary to well-established Mississippi law. *Home Insurance Co. v. Sherrill*, 174 F.2d 945 (5th Cir.1949); *Lunday v. Lititz Mutual Insurance Co.*, 276 So.2d 696 (Miss.1973); *Lititz Mutual Insurance Co. v. Buckley*, 261 So.2d 492 (Miss.1972); *Grace v. Lititz Mutual Insurance Co.*, 257 So.2d 217 (Miss.1972); *Lititz Mutual Insurance Co. v. Boatner*, 254 So.2d 765 (Miss.1971); *Commercial Union Ins. Co. v. Byrne*, 248 So.2d 777 (Miss.1971); *Firemen's Insurance Co. v. Schulte*, 200 So.2d 240 (Miss.1967). This reading of the policy would make the windstorm protection illusory for those who live in areas where the risk of flooding is greatest.

Nationwide seems to recognize this to be the reasonable interpretation of its policy. Nationwide has not invoked this policy provision to deny coverage to the Leonards for what everyone recognizes to be wind damage.

5. The Leonards have the burden of proving that the insured property was damaged or destroyed by a cause within the insuring language of the policy during the time the policy was in force. For their structure, this requires the Leonards to prove that there was a direct accidental physical loss to the property. For their contents, this requires the Leonards to prove that there was a direct physical loss caused by one of the perils enumerated in the policy.

6. Nationwide has the burden of proving what portion of the total loss was attributable to water damage and was thus within the water damage exclusion. *Commercial Union Insurance Co. v. Byrne*, 248 So.2d 777 (Miss.1971).

7. Under applicable Mississippi law, in a situation such as this, where the insured property sustains damage from both wind (a covered loss) and water (an excluded loss), the insured may recover that portion of the loss which he can prove to have been caused by wind. *Grace v. Lititz Mutual Insurance Co.*, 257 So.2d 217 (Miss.1972). Nationwide is not responsible for that portion of the damage it can prove was caused by water. To the extent property is damaged

by wind, and is thereafter also damaged by water, the insured can recover that portion of the loss which he can prove to have been caused by wind, but the insurer is not responsible for any additional loss it can prove to have been later caused by water. *Lititz Mutual Insurance Co. v. Boatner*, 254 So.2d 765 (Miss.1971).

8. There is no evidence to support a finding that this insurance contract should be reformed. Nationwide provided a copy of the policy to the Leonards, and Paul Leonard read the policy. Having done so, the plaintiffs are bound by the express terms of the policy, even if their interpretation of the policy was incorrect and even if the inferences they drew from the conversations they had with Fletcher were erroneous.

9. The Nationwide homeowners policy was approved by the Mississippi Department of Insurance, and Nationwide contends that this approval conclusively establishes that the terms of its policies are clear and unambiguous. Nationwide reasons that because the Department of Insurance is prohibited from approving any policy provision that is ambiguous, any provision the department approves must be unambiguous. Nationwide does not take into consideration that all human endeavors, including the approval of insurance policies, are subject to error. Under applicable Mississippi law, the construction of the terms of any insurance policy are subject to judicial review, notwithstanding the

fact that they have been approved by the Mississippi Department of Insurance.

10. Almost all of the damage to the Leonard residence is attributable to the incursion of water.

There was ample evidence that the storm surge waters severely damaged the walls of the garage and the overhead doors used to drive into and out of the garage. There was also evidence that later in the day, after the storm surge waters had receded and the wind had shifted and begun to come in from the west, the wind inflicted additional damage to these overhead doors. My review of the evidence leads me to the conclusion that these garage doors were damaged enough to be considered a total loss before the time the wind shifted and began to come in from the west. Accordingly, the wind damage to the overhead doors did not enhance or exacerbate the damage these doors had earlier sustained by the force of the storm surge water.

The structural damage to the walls of the garage was more likely than not also caused by the surging water that accompanied the storm. There was no substantial evidence that the garage was structurally damaged before the rising water reached the Leonard property.

None of the damage to the interior of the Leonard property was shown to have been caused by wind. The exterior doors on the first floor were boarded

up before the Leonards left their home, and the boards were still in place after they returned. The most likely cause of the damage to these french doors was water, not wind.

There was evidence to support the conclusion that one of the windows on the ground floor of the Leonard residence was damaged by some wind-driven object.

Plaintiffs contended that wind damage to the roof on the Leonard property had voided the roof's warranty, but the evidence showed that the roof's warranty had expired before Hurricane Katrina. The Leonard roof was fifteen years old at the time of the storm, and its watertight integrity was not compromised by the storm. I find that the sum tendered by Nationwide to repair the damage to the shingles of the Leonard roof was adequate to fairly compensate the Leonards for this damage. The evidence did not substantiate the Leonards' allegation that the damage inflicted by Hurricane Katrina to their roof was severe enough to require that the roof be replaced.

Likewise, I find that the sum tendered by Nationwide was sufficient to compensate the Leonards for damage to their fence.

The evidence indicates that wind-driven debris soiled and scuffed the exterior walls of the Leonard residence and the exterior walls of the garage above

the high water mark of five feet. The Leonards are entitled to compensation for cleaning and for the repairs to those portions of these exterior walls.

11. The Leonards have met the burden of proving, by a preponderance of the evidence, that the following items of damage to the Leonards' property were caused by wind:

window damage (replacement)	$230.76
expense of cleaning and repairing exterior walls above water line	$997.40

The expense for exterior cleaning is based upon a total estimate of $1,994.80. I have allowed one-half of this expense for the portions of the exterior above the water line. Most of the exterior of the Leonards' buildings is above the water line, but the smaller portion below the water line was more soiled and scuffed than the higher parts of these buildings, and this lower portion will require a disproportionate amount of time to clean. This conclusion is based upon the photographs that are part of the record.

12. Nationwide has met the burden of proving, by a preponderance of the evidence, that all other damage to the Leonards' property was caused by water and waterborne materials within provision 1(b) of the Property Exclusions section of the Nationwide policy.

An appropriate order will be entered, and this case will thereby be dismissed.

Decided this 15th day of August, 2006.

s/ L. T. Senter, Jr.
L. T. Senter, Jr.
Senior Judge

APPENDIX C — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION FILED AUGUST 15, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:05CV475 LTS-RHW

PAUL LEONARD and JULIE LEONARD

PLAINTIFFS

V.

NATIONWIDE MUTUAL INSURANCE COMPANY

DEFENDANT

ORDER AND JUDGMENT

In accordance with the Memorandum Opinion I have this day signed, it is

ORDERED and **ADJUDGED**

That Plaintiffs Paul and Julie Leonard **SHALL HAVE OF AND RECOVER FROM** Nationwide Mutual Insurance Company the sum of $1,228.16;

That Plaintiffs Paul and Julie Leonard's motion for partial summary judgment [22] is hereby **DENIED;**

That Nationwide Mutual Insurance Company's motion for partial summary judgment [100] is hereby **DENIED;**

That Plaintiffs Paul and Julie Leonard's motion for a protective order [25] is hereby **DENIED AS MOOT;**

That Nationwide Mutual Insurance Company's motion to compel discovery [28] is hereby **DENIED AS MOOT;**

That Plaintiffs Paul and Julie Leonard's motion to compel discovery [60] is hereby **DENIED AS MOOT;**

That Nationwide Mutual Insurance Company's motion to quash document subpoenas to Jay Fletcher and Cindy Byrd [158] is hereby **DENIED AS MOOT;**

That the order entered on June 27, 2006, granting in part and denying in part Nationwide Mutual Insurance Company's motion in limine to exclude evidence concerning Nationwide's adjustment of other claims is hereby **MODIFIED** to allow the admission of all evidence presented at trial concerning the adjustment of claims;

I reserved ruling during trial on the following matters, and I now make the following rulings:

With respect to documents not furnished to the defendant until June 6, 2006, I will **OVERRULE** the motion to strike and **ADMIT** these documents into evidence;

Appendix C

With respect to the question whether testimony concerning Jay Fletcher's conversations with other Nationwide clients on the subject of flood coverage are admissible under Rule 406 of the Federal Rules of Evidence, I find that these conversations are **ADMISSIBLE** in that they reflect the routine practice of Mr. Fletcher when he was asked about the purchase of flood insurance;

With respect to the opinions of the experts who testified for each side, I reserved certain rulings concerning these witnesses' qualifications. I now find that all of the individuals tendered as experts were **QUALIFIED** to express the opinions they rendered, and none of the expert testimony will be stricken.

That this action is hereby finally dismissed, each party to bear its own costs.

SO ORDERED this 15th day of August, 2006.

s/ L. T. Senter, Jr.
L. T. Senter, Jr.
Senior Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION FILED OCTOBER 25, 2006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:05CV475 LTS-RHW

PAUL LEONARD AND JULIE LEONARD

PLAINTIFFS

V.

NATIONWIDE MUTUAL INSURANCE COMPANY

DEFENDANT

ORDER

In accordance with the Memorandum Opinion I have this day signed, it is **ORDERED**

That Plaintiffs Paul and Julie Leonard's Motion for Judgment as a Matter of Law or, Alternatively, To Amend Findings of Fact and Conclusions of Law, or For a New Trial [176] is hereby **DENIED**, and

That the motion of Nationwide Insurance Company to Stay Execution of the Judgment [175] entered in this

action pending the outcome of any appeal will be **GRANTED** upon Nationwide's payment of the amount of the judgment into the registry of the Court.

SIGNED this 24th day of October, 2006.

s/ L. T. Senter, Jr.
L. T. Senter, Jr.
Senior Judge

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED OCTOBER 2, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-61130

PAUL LEONARD; JULIE LEONARD

Plaintiffs - Appellee-Cross-Appellants

v.

NATIONWIDE MUTUAL INSURANCE CO.

Defendant - Appellant-Cross-Appellee

Appeals from the United States District Court for the Southern District of Mississippi, Gulfport

ON PETITION FOR REHEARING EN BANC

(Opinion 8/30/07, 5 Cir., __, __F.3d __)

Before JONES, Chief Judge, and REAVLEY and SMITH, Circuit Judges.

Appendix E

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Edith H. Jones
United States Circuit Judge

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* Judge Clement did not participate in the consideration of the rehearing en banc.

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(2)

No. 07-880

FILED
MAR 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PAUL LEONARD AND JULIE LEONARD,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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CNN.com, *Judge Rejects Claim for Katrina Flood Damage*, Aug. 15, 2006
(Tab A to Resp. to Mot. to Dismiss Cross-Appeal & Appeal, *Nationwide Mut. Ins. Co. v. Leonard*, 5th Cir. Nos. 06-61130 & 06-61131)
(filed July 27, 2007) 1a

The Mississippi Press, *Family Rewarded for Taking on Insurance Company*, May 16, 2007
(Tab B to Resp. to Mot. to Dismiss Cross-Appeal & Appeal, *Nationwide Mut. Ins. Co. v. Leonard*, 5th Cir. Nos. 06-61130 & 06-61131)
(filed July 27, 2007) 4a

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Nationwide Mutual Insurance Company states that it is a corporation organized under Ohio law. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF AUTHORITIES

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Supreme Court Practice (9th ed. 2007) 12

INTRODUCTION

Even petitioners do not seriously contend that this case warrants this Court's plenary review. To the contrary, they assert that "summary disposition" is warranted here on the ground that the Fifth Circuit ignored the "clear" and "settled" rule that "*[g]enerally*, a party may not appeal the district court's reasoning if it is otherwise satisfied by the judgment." Pet. i, 8, 9, 13 (emphasis added).

Of course, the key word there is "generally." Neither the Fifth Circuit nor respondent denies that "'[o]rdinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom.'" Pet. App. 11a (quoting *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980)). And petitioners, for their part, do not deny that appellate jurisdiction may be appropriate even where the party seeking to appeal is not aggrieved by the judgment "so long as that party retains a stake in the appeal satisfying the requirements of Art. III." *Roper*, 445 U.S. at 334; *see also Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939).

The real question in cases of this nature, then, is whether the particular injury asserted by a party seeking to appeal gives that party a sufficient stake in the appeal for Article III purposes. Needless to say, the answer to that question will depend on the facts of the particular case. Contrary to petitioners' suggestion, the Fifth Circuit did not break any new legal ground here, but simply concluded that respondent was "sufficiently aggrieved" by the district court's adverse rulings in this particular case to appeal those rulings. Pet. App. 14a. That

factbound conclusion does not remotely warrant this Court's plenary review, much less the extraordinary remedy of summary reversal.

At the end of the day, let there be no mistake about what is going on here. There are thousands of insurance cases in Mississippi arising out of Hurricane Katrina, and virtually all of those cases pending in federal court have been assigned to the district judge below. Petitioners led that judge into error by urging him (1) to invalidate the anti-concurrent causation clause in respondent's standard homeowner's policy, and (2) to allow claims based on alleged oral misrepresentations inconsistent with the plain terms of a written policy. Not surprisingly, petitioners wish to immunize those erroneous rulings from appellate review to pressure Nationwide and other insurers into either settling unmeritorious claims or facing a threat of punitive damages for bad-faith claims denials. As the Fifth Circuit put it, with some understatement, "[i]t stretches credulity to suggest that these rulings ... do not adversely affect Nationwide's rights or render it an aggrieved party in this appeal." Pet. App. 12a. Under these circumstances, nothing in law or logic precludes appellate review of the challenged rulings. Accordingly, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Petitioners Paul and Julie Leonard own a home in Pascagoula, Mississippi less than two hundred yards from the Mississippi Sound. Pet. App. 2a. When Hurricane Katrina made landfall on the Gulf Coast on August 29, 2005, the Leonards' home suffered significant water damage. Flooding from

the Mississippi Sound submerged the ground floor of their home under five feet of water. *Id.* at 8a.

At the time, the Leonards' property was insured under a standard homeowner's policy issued by respondent Nationwide Mutual Insurance Company. *Id.* at 2a. As relevant here, the policy distinguished between two types of storm-related damage: (1) wind damage (which the policy covered), and (2) water damage (which the policy excluded). *Id.* at 4-5a. Although the Leonards were aware that their policy did not cover flood loss, they chose not to purchase flood insurance through the National Flood Insurance Program. *Id.* at 5a.

After Hurricane Katrina, the Leonards filed a claim under their homeowner's policy for *all* of their property damage. According to the Leonards, their policy did not exclude damage caused by wind-driven water. Nationwide disagreed. It compensated them for modest wind damage to their roof and fence, but did not compensate them for the extensive water damage to their home. *Id.* at 7-8a. Nationwide rested its partial denial on two different provisions of the Leonards' standard homeowner's policy: (1) a water damage exclusion, which excluded "[l]oss resulting from water or water-borne material damage," and (2) an anti-concurrent causation clause, which excluded water damage "even if another peril or event contributed concurrently or in any sequence to cause the loss." *Id.* at 4-5a. Taken together, these provisions categorically excluded the Leonards' water damage, even assuming that another peril (like wind) contributed to the Leonards' loss. *Id.* at 18a.

B. Procedural History

Following Nationwide's partial denial of their claims, the Leonards filed this lawsuit against Nationwide and their local Nationwide agent, Jay Fletcher. The Leonards alleged that their standard homeowner's policy covered the water damage to their property. The Leonards also alleged that, even if their policy's terms did not cover their water damage, Fletcher had orally modified those terms. According to the Leonards, Fletcher told them that their policy covered all hurricane-related damage, including any water damage. The Leonards subsequently dismissed Fletcher as a defendant, but continued to maintain that he had orally modified their written contract.

Before trial, Nationwide moved for partial summary judgment on both of the Leonards' theories: *first*, that the plain terms of the policy unambiguously excluded damage caused by water, even if concurrently caused by wind (so that the court did not need to determine whether water or wind caused the damage first); and *second*, that those terms could not be modified by an agent's alleged oral statements under Mississippi contract law. *Id.* at 8-9a. The district court (Senter, J.) carried Nationwide's motion with the case to trial. *Id.* at 9a.

Following a bench trial, the court entered judgment in the Leonards' favor in the amount of $1,228.16 for uncompensated wind damage. *Id.* at 73a. The judgment on its face also specifically denied Nationwide's motion for summary judgment. *Id.* at 74a. In an accompanying memorandum

opinion, the district court construed the policy, and made two important rulings.

First, the court ruled that the anti-concurrent causation clause was "ambiguous" as a matter of law and hence unenforceable. *Id.* at 64-69a. The court, however, found that "almost all of the damage to the Leonard residence is attributable to the incursion of water" *before* the wind arrived. *Id.* at 69a. The court thus awarded the Leonards relief only with respect to relatively minor damage caused solely by wind *after* the flood. *Id.* at 69-71a.

Second, the court ruled that the Leonards could state a negligent misrepresentation claim as a matter of law. *Id.* at 68a. The court concluded, however, that Fletcher's alleged statements were not actionable on the particular facts of this case, because the inferences that Paul Leonard allegedly drew from those statements were not reasonable. *Id.* at 55-63a, 68a.

Nationwide appealed the district court's adverse legal rulings. Rather than challenging appellate jurisdiction over Nationwide's appeal, the Leonards cross-appealed the court's determination upholding the policy's water damage exclusion. *See* Pet. App. 10a. And in their opening merits brief, petitioners affirmatively vouched for appellate jurisdiction. *See* Br. of Appellee/Cross-Appellants at 1, *Leonard v. Nationwide Mut. Ins. Co.*, Nos. 06-61130 & 06-61131 (5th Cir. Mar. 30, 2007) ("The Court of Appeals has jurisdiction under 28 U.S.C. § 1291.").

After the appeal was fully briefed, Nationwide moved to expedite the oral argument in order to provide clarity in the many pending Mississippi Katrina cases. The Leonards unsuccessfully opposed

that motion. Less than a month before the expedited oral argument, the Leonards unsuccessfully moved to postpone the argument date and/or to certify questions to the Mississippi Supreme Court.

One week after that motion was denied, and only days before oral argument, the Leonards moved to dismiss not only their own cross-appeal but also Nationwide's appeal. *Id.* at 10a. In that motion, they argued for the first time that Nationwide lacked standing to appeal because it was not challenging the money judgment in their favor. *Id.* The Fifth Circuit carried the motion with the case.

On August 27, 2005, the Fifth Circuit denied the Leonards' motion to dismiss their own cross-appeal. Three days later, the Fifth Circuit released the decision below. In that decision, a unanimous panel (Jones, C.J., joined by Reavley and Smith, JJ.) upheld Nationwide's standing to appeal. The court began by acknowledging the general rule that "'[o]rdinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom.'" Pet. App. 11a (quoting *Roper*, 445 U.S. at 333). But that rule, the court noted, is not absolute, and "[e]ven the *Roper* dissenters recognized the fundamental principle that a party may appeal any aspect of a generally favorable judgment that affects him adversely, *so long as the party can satisfy the personal-interest requirement of Article III.*" *Id.* (emphasis added).

In this case, the court explained, Nationwide unquestionably retained a personal interest in challenging the district court's adverse rulings: "[these] issues are currently being litigated by Nationwide in hundreds of cases in the trial courts,

causing Nationwide to incur considerable litigation expense and potential enormous liability to other policyholders." *Id.* at 13-14a. Under these circumstances, "[i]t stretches credulity to suggest that these rulings ... do not adversely affect Nationwide's rights or render it an aggrieved party in this appeal." *Id.* at 12a. On the merits, the Fifth Circuit reversed or vacated the legal rulings adverse to Nationwide as inconsistent with the policy's plain language or Mississippi contract law. *Id.* at 16-46a.

The Leonards sought reconsideration of the denial of their motion to dismiss their cross-appeal, as well as rehearing *en banc*. The Fifth Circuit agreed to dismiss the Leonards' cross-appeal, but denied rehearing *en banc*. *See* Pet. App. 78-79a.

Petitioners now seek this Court's review of the appellate jurisdiction issue.

REASON FOR DENYING THE WRIT

The Decision Below Is Correct And Does Not Warrant This Court's Review.

The petition is most notable for what it does *not* say: namely, that this case merits this Court's plenary review. That is no oversight on the Leonards' part. They know full well that they cannot satisfy the established criteria for such review. *See* S. Ct. R. 10. That is why they ask for "summary disposition," rather than plenary review. Pet. i, 9.

What the Leonards are seeking here, in a nutshell, is at most error correction. They contend that the Fifth Circuit violated "clear" and "settled" law as established by this Court and applied by other lower courts. *Id.* at 8, 9. Indeed, they characterize the Fifth Circuit's decision as "heretical," *id.* at 23;

"an aberration in the law," *id.* at 8; and a "radical departure from the usual course of judicial proceedings," *id.* at 24.

But when the Leonards move beyond such rhetoric to articulating the allegedly "clear" and "settled" rule that the Fifth Circuit supposedly violated, the most that they can say is that "*[g]enerally*, a party may not appeal the district court's reasoning if it is otherwise satisfied by the judgment." *Id.* at 8, 9, 13 (emphasis added); *see also id.* at 13, 14 (referring to the "*general* rule") (emphasis added). Nationwide has no quarrel with that "general rule," *id.*, and the Fifth Circuit did not either, *see* Pet. App. 11a ("'*Ordinarily*, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom.'") (quoting *Roper*, 445 U.S. at 333; emphasis added). But a general rule is not the same thing as an absolute rule. This general rule, like other general rules, is subject to exceptions.

Indeed, as the Leonards are forced to concede, this Court has specifically *rejected* the argument that only a party aggrieved by a judgment may invoke federal appellate jurisdiction. *See, e.g.*, *Roper*, 445 U.S. 326; *Electrical Fittings*, 307 U.S. 241. There is thus no dispute here over the general rule, nor about the existence of an exception to that rule. Rather, the dispute here is only about the scope of that exception. The Leonards try to narrow the exception almost to the point of non-existence by essentially limiting *Roper* and *Electrical Fittings* to their facts. *See* Pet. 13-17. But the Leonards' efforts to distinguish *Roper* and *Electrical Fittings* on their

facts are unavailing, and provide no basis for either plenary review or summary reversal.

In *Electrical Fittings*, this Court held that a party who prevailed in a patent dispute on grounds of noninfringement could nonetheless appeal the district court's ruling that the disputed patent was valid. *See* 307 U.S. at 242. The Leonards dismiss that case as "an aberration," complain that the Court "failed to explain its holding," and note that "commentators have struggled with the contours of federal appellate jurisdiction" in light of the case. Pet. 8, 13, 14. But the Leonards neither ask this Court to overrule *Electrical Fittings*, nor provide any meaningful basis for distinguishing the case. Although they half-heartedly suggest that it should be limited to the patent context, *see id.* at 14, they provide no basis in law or logic for any such limitation.

Similarly, in *Roper*, this Court held that plaintiffs could appeal a final judgment in their favor in order to seek review of an adverse legal ruling (the denial of class certification) rendered along the road to that judgment. *See* 445 U.S. at 333-34. The most that the Leonards can say about *Roper* is that, "*carefully read*, the Court's opinion ... *seems* to limit its application to class actions." Pet. 15 (emphasis added). But (as the italicized qualifications underscore) *Roper* itself establishes no such limitations on its scope. Indeed, *Roper* relied on *Electrical Fittings*, which did not involve a class action. *See Roper*, 445 U.S. at 334-35.

The lesson of *Electrical Fittings* and *Roper*, as the Fifth Circuit recognized below, is that "[i]n an appropriate case, appeal may be permitted from an

adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, *so long as that party retains a stake in the appeal satisfying the requirements of Art. III.*" *Roper*, 445 U.S. at 334 (emphasis added); *see generally* Pet. App. 11-12a & n.1. That approach makes perfect sense: it would be the height of unfairness to categorically preclude a party from appealing an adverse ruling with ongoing collateral consequences simply because that party eventually prevailed on some other ground. Whether a particular party seeking to appeal a ruling collateral to a particular judgment "retains a stake in the appeal satisfying the requirements of Art. III," of course, depends on the facts of the particular case. What the Leonards are really doing, in other words, is challenging the Fifth Circuit's application of the *Roper* test to the facts of this particular case.

Indeed, the Fifth Circuit is hardly alone in recognizing that, even outside the patent and class action contexts, a party who has obtained a favorable judgment may nonetheless be sufficiently aggrieved by an adverse collateral ruling to appeal. *See, e.g., AT&T Corp. v. FCC*, 317 F.3d 227, 237-38 (D.C. Cir. 2003) (allowing prevailing party to appeal collateral ruling in action under the Federal Communications Act); *Environmental Prot. Info. Ctr., Inc. v. Pacific Lumber Co.*, 257 F.3d 1071, 1077 (9th Cir. 2001) (same; Endangered Species Act); *Custer v. Sweeney*, 89 F.3d 1156, 1164 (4th Cir. 1996) (same; Employee Retirement Income Security Act); *Jarvis v. Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1424-25 (10th Cir 1993) (same; Labor-Management Relations Act). The point here is not whether these decisions were right or wrong on the particular facts before

them. Rather, the point here is that no federal appellate court has confined *Electrical Fittings* and *Roper* to their facts in the manner now proposed by petitioners.

Accordingly, the Leonards' reliance on the general rule that "federal appellate courts review judgments, not reasoning," Pet. 8; *see also id.* at 10-11, is misplaced. That is a prudential rule of thumb, not an absolute constitutional prohibition. To the contrary, as *Roper* and *Electrical Fittings* underscore, no such absolute prohibition exists.

That is not to say, of course, that a party who has obtained a favorable judgment will *always* be sufficiently aggrieved by an adverse collateral ruling to appeal. Again, it all depends on the facts and circumstances of the case. *See, e.g.*, *ASARCO, Inc. v. Secretary of Labor*, 206 F.3d 720, 723-24 (6th Cir. 2000) (declining to exercise appellate jurisdiction to address administrative agency's methodology in particular case, and emphasizing that "the only damage to [the putative appellant] is, perhaps, the cost that it *may* incur in repeating the litigation of the single-sampling issue in the future, *if* it is cited for a violation, *if* the citation rests on a single-shift sample, and *if* the citation is upheld by an ALJ.") (emphasis in original); *United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999) ("Although it is possible to imagine situations in which language alone would meet the adverse effect requirement, a litigant's allegations do not cross that threshold even if they portend long and costly wrangling."); *HCA Health Servs. of Va. v. Metropolitan Life Ins. Co.*, 957 F.2d 120, 123 (4th Cir. 1992) ("[The putative appellant] lacks standing to prosecute its cross-

appeal, since it is aggrieved neither in its relationship with the parties to this case nor with respect to any other potential future litigant.").

Here, the Fifth Circuit simply concluded that Nationwide retained a sufficient stake to appeal on the particular facts of this case, and that conclusion does not remotely warrant this Court's review. *See, e.g.*, S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of ...the misapplication of a properly stated rule of law."); Robert L. Stern *et al.*, *Supreme Court Practice* § 4.14, at 270 (9th ed. 2007) ("The Supreme Court will usually deny certiorari when review is sought of a lower court decision that turns solely upon an analysis of the particular facts involved.").

Indeed, as the Fifth Circuit explained, on the facts of this case, "[i]t stretches credulity to suggest that [the district court's disputed] rulings ... do not adversely affect Nationwide's rights or render it an aggrieved party in this appeal." Pet. App. 12a. This case stands at the front of a very long line of Katrina-related Mississippi insurance cases, and virtually all of those cases in federal court are being handled by the district judge below. Without the ability to rely on the plain language of its standard homeowner's policy, Nationwide would be forced "to incur considerable litigation expense and potential enormous liability to other policyholders," including "[t]he threat of additional claims for bad-faith denial of coverage." *Id.* at 13-14a. Accordingly, Nationwide's appeal did not present some academic exercise in contract interpretation. Rather, Nationwide was "aggrieved by a district court decision that adversely affect[ed] its legal rights or

position vis-a-vis other parties in the case or other potential litigants." *Custer*, 89 F.3d at 1164.

Nor is it true, as the Leonards insist, that the only adverse collateral consequences that count are adverse collateral consequences in "the case *sub judice* ... *not* some other action." Pet. 18 (emphasis in original); *see also id.* at 19 ("[A] party must retain a stake that is still cognizable and reparable in *this* case, not some other.") (emphasis in original); *id.* at 30 ("The cost of future litigation does not give Nationwide standing.") (emphasis and capitalization omitted). The Leonards' own cases recognize that adverse consequences in other cases *can* create a sufficient "stake" for a prevailing party to appeal a ruling collateral to the judgment. *See, e.g.*, *ASARCO*, 206 F.3d at 723; *In re DES Litig.*, 7 F.3d 20, 23-25 (2d Cir. 1993); *see also Electrical Fittings*, 307 U.S. at 242; *AT&T*, 317 F.3d at 237-38; *Jarvis*, 985 F.2d at 1424-25. Indeed, this ostensible limitation would essentially gut the exception, because a party who has ultimately prevailed in particular case is unlikely to be able to show that an adverse collateral ruling will injure him in that very case, as opposed to some other case. The Leonards identify no basis in principle or precedent to limit Article III injury in this manner.

At the end of the day, there is no mystery about why the Leonards are seeking review of the Fifth Circuit's decision *affirming* the judgment in their favor, *see* Pet. App. 1a, 46a: their attorneys (or at least their former attorneys) know that the erroneous district court rulings reversed by the Fifth Circuit "vitally affect Nationwide's rights in subsequent litigation involving its homeowner's

policy," *see id.* at 12a, and the attorneys have a keen interest in the matter. Thus, although the judgment in this case awarded the Leonards only $1,228.16, *see* Pet. App. 73a, their former lead attorney, Richard Scruggs, proclaimed that "[t]his was a big win for us" because the district court's legal rulings adverse to Nationwide "would set a precedent for homeowners" and "that's going to be huge in future cases." Opp. App. 2a. And after the district court entered that relatively modest judgment in the Leonards' favor, Scruggs—who argued this case in the Fifth Circuit—"rewarded" the Leonards with an undisclosed sum of money for "le[a]d[ing] the way" and "ma[king] all this possible," presumably referring to favorable settlements obtained in light of the district court's rulings in this case. Opp. App. 4a; *see also id.* at 5a (quoting Scruggs as stating that "[n]one of this would have happened if it were not for the Leonards").

In any event, this case does not present an appropriate vehicle for deciding whether prevailing parties can appeal rulings collateral to the judgment, since the rulings at issue in this case are *not* collateral to the judgment. To the contrary, as in *Electrical Fittings*, *see* 307 U.S. at 242, the adverse rulings appealed by Nationwide are set forth right on the face of the judgment, *see* Pet. App. 74a ("Nationwide Mutual Insurance Company's motion for partial summary judgment ... is hereby **DENIED**."); Pet. App. 75a ("With respect to the question whether testimony concerning Jay Fletcher's conversations with other Nationwide clients on the subject of flood coverage are admissible under Rule 406 of the Federal Rules of Evidence, I find that these conversations are **ADMISSIBLE** in that they reflect the routine practice of Mr. Fletcher

when he was asked about the purchase of flood insurance.").

In other words, the very premise of the petition—that Nationwide was "satisfied with the judgment," Pet. 8; *see also id.* at 5—is incorrect. Because the rulings challenged by Nationwide were on the face of the judgment in this case, Nationwide was entitled to appeal even under the Leonards' own cases. *See, e.g.*, *DES*, 7 F.3d at 25 (recognizing that a prevailing party can appeal "where [it] can show that it is aggrieved by some aspect of the trial court's judgment or decree") (citing *Electrical Fittings*, 307 U.S. at 242); *see also id.* ("[T]he District Court's [challenged] rulings ... do not appear on the face of the judgment, as was the case with the finding of validity in *Electrical Fittings*.").

Finally, this case presents a poor vehicle for addressing the question presented in the petition because the Leonards have been playing games on the jurisdictional issue all along. They did not contest appellate jurisdiction when Nationwide filed its notice of appeal. To the contrary, they filed a cross-appeal and affirmatively vouched for appellate jurisdiction over *both* the appeal and the cross-appeal. They then tried to drag out the appellate process by seeking extensions of time for both of their briefs, opposing Nationwide's motion to expedite the oral argument, and seeking to certify questions to the Mississippi Supreme Court. It was not until after they lost that last gambit, just days before the oral argument was scheduled, that they argued for the first time that appellate jurisdiction was lacking—even though Nationwide had addressed the issue of appellate jurisdiction at some length in

its opening brief. Although parties obviously cannot create jurisdiction by consent or waiver, the Leonards certainly cannot now be heard to complain that the Fifth Circuit violated "clear" and "settled" law by exercising appellate jurisdiction here when the Leonards themselves affirmatively vouched for such jurisdiction. Accordingly, even if the questions presented in the petition warranted this Court's review (which they do not), this would not be an appropriate case in which to review them.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

Judge rejects claim for Katrina flood damage

Claim for wind damage granted; both sides declare victory

Tuesday, August 15, 2006;
Posted 9:45 p.m. EDT (01:45 GMT)

PASCAGOULA, Mississippi (CNN)—A federal judge Tuesday rejected a couple's insurance claim for Hurricane Katrina-related flood damage in a case sure to resonate with homeowners ravaged last year by the storm.

Senior District Judge L.T. Senter Jr. said the insurance policy of plaintiffs Paul and Julie Leonard of Pascagoula, Mississippi, specifically excluded flood damage.

However, Senter ruled that the couple could collect compensation from Nationwide Mutual Insurance Co. for wind damage—a total of $1,228.16. The Leonards said their Gulf Coast home incurred more than $130,000 in wind and flood damage on August 29, when Hurricane Katrina raked the Gulf Coast.

The lawsuit argued that a Nationwide insurance policy bought by the Leonards in 2004 purported to provide full coverage for any damage typically caused by hurricanes. The lawsuit also said the insurance agent told the Leonards they did not need to purchase additional flood insurance, which is offered separately by the federal government.

Both sides claimed victory.

The Leonards' attorney, Richard Scruggs, interpreted the 13-page ruling as "a big win," despite the modest size of the award.

He predicted it would set a precedent for homeowners.

"The insurance companies have been saying to everyone, under that clause that they lost today, that if you had 1 millimeter of saltwater in your home there was no coverage, even if the hurricane winds blew off your roof," he said.

"That, now, is off the playing field," Scruggs said. "They lost that, and that's going to be huge in future cases. This was a big win for us. Monetarily, it could have been more. We asked for more and thought it was justified, but a win is a win in the first game of the season, and you just take it."

In a written statement, Nationwide said, "We are very pleased that the court ruled in our favor and upheld the long-standing flood exclusion language which is foundational to traditional homeowner policies across the country."

The statement further said: "While it is unfortunate that the Leonards did not choose to purchase flood coverage, insurance carriers have an obligation on behalf of all policyholders to adjust claims based on factual evidence that supports coverage payments. We will continue to adjust claims on a case-by-case basis.

"This ruling underscores just how important it is for all policyholders to carefully read and understand the terms of the coverage they purchase," the statement said.

The Leonards filed their case in October in U.S. District Court in Southern Mississippi. It was the first to be heard among the hundreds of other Katrina-related cases against insurers, which have

argued that they are not responsible for reimbursing homeowners for flood or wind damage.

Scruggs alleged that Jay Fletcher, Nationwide's sales representative, intentionally misled the couple about what their policy covered.

The judge disagreed.

"Fletcher did not materially misrepresent the terms of the Nationwide homeowners policy to the Leonards, and Fletcher did not make any statements which could be reasonably understood to alter the terms of the Nationwide policy," Senter wrote.

CNN's Megan Towey and Sean Callebs contributed to this story.

Family rewarded for taking on insurance company

Scruggs-Katrina group presents Paul Leonard with check

BY BRAD CROCKER
The Mississippi Press

Moss Point—When a federal judge awarded Paul and Julie Leonard $1,620 last summer in the state's first post-Katrina lawsuit against an insurance company, the Pascagoula couple considered it a moral victory for thousands of homeowners who would follow.

On Tuesday, the Leonards were rewarded for their stance with a check for an undisclosed amount of money from attorneys with the Scruggs Katrina Group, comprised of four Mississippi law firms.

Richard "Dickie" Scruggs presented the check to Paul Leonard during an impromptu meeting at the Scruggs Law Firm in Moss Point.

Scruggs said the Leonards and their daughter, Hope, were "pioneers" in filing the first lawsuit and eventually allowing the Scruggs Katrina Group to settle more than 1,000 other cases for their clients. About one-quarter of those cases involved Nationwide, the Leonards' insurance carrier before Katrina.

"Since Paul, Julie and Hope led the way and made all this possible, I think this (check) ... was the least we could do for them," said Scruggs, adding that the money does not have to repaid.

Leonard, a lieutenant and press liaison for the Pascagoula Police Department, said he was at a loss

for words and was dumbfounded when he heard what the attorneys had proposed.

"All I knew about was a meeting. I had no idea of what was going on when I got here," Leonard said of "the shock factor" he experienced.

The Leonards claimed that Katrina caused about $130,253 in total damages to their Washington Avenue home. Nationwide paid the couple $1,661. Although the amount of the check presented Tuesday was not announced, Leonard said "it's going to help tremendously."

The "largest gift of compassion" he's ever received, Leonard added, will help the family recoup out-of-pocket expenses for repairs.

"We've been through a lot. We're so grateful," Leonard said.

His wife and daughter were both sick Tuesday and unable to attend the surprise presentation, but Leonard used his wife's quote last summer that the Katrina debates and what would follow was "bigger than us (and) this is not about us."

Leonard said he has known Scruggs all his life, as a neighbor and a friend, and their case was the first time he said he needed him as an attorney.

As the Aug. 29, 2005, storm died down in their south Pascagoula neighborhood, the Leonard said he and Scruggs began talking with others about the unprecedented insurance debates that would arise.

"They (Leonards) put themselves out on the line right away ... going to the minefield, so to speak. None of this would have happened if it were not for the Leonards," said Scruggs, a nationally-known

attorney who participated in a successful legal battle against the tobacco industry in the 1990s that was led by former Attorney General Mike Moore, also a Pascagoula native.

The Leonards' case also led to a requirement that all insurance companies being sued would pay attorney fees so homeowners would not fall further behind financially, Scruggs added.

In their lawsuit, the Leonards claimed Nationwide agent Jay Fletcher, who they had done business with for 10 years, told them they did not need flood insurance.

U.S. District Judge L.T. Senter Jr. rejected the Leonards' claim that Fletcher told them their coverage included both wind and water. Leonard mistakenly presumed that his policy covered water damage, Senter ruled, but Leonard said in the week-long trial that he remembered conversations differently.

The Leonards' case, which is now in the U.S. Court of Appeals in New Orleans, remains active with hearings scheduled this summer, said Scruggs, adding that the check Tuesday does not affect the case.

Reporter Brad Crocker can be reached at bcrocker@themississippipress.com or (228) 934-1431.